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REPORTS

OF

CASES IN EQUITY

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

FROM DECEMBER TERM 1854, TO AUGUST TERM, 1856, INCLUSIVE.

VOL. II.

BY HAMILTON C. JONES.

SALISBURY, N. C.
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1856.

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JUDGES OF THE SUPREME COURT.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

—o—

HON. FREDERICK NASH, CHIEF JUSTICE.
" RICHMOND M. PEARSON,
" WILLIAM H. BATTLE.

—o—

JUDGES OF THE SUPERIOR COURTS.

—o—

HON. JOHN M. DICK,
" JOHN L. BAILEY,
" MATTHIAS E. MANLY.
" DAVID F. CALDWELL,
" JOHN W. ELLIS,
" ROMULUS M. SAUNDERS,
" S. J. PERSON.

—o—

ATTORNEY GENERAL,
J. B. BATCHELOR, ESQUIRE.

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CASES IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1854.

JAMES H. RHODES AND RICHARD S. RHODES *against* JOHN CHANDLER.

Where one was bound in a bond to make title to land, and it appeared that the land had been granted by the State, more than fifty years ago, and that it had been cultivated during that time by persons coming in under the original grantees, and that for the last twenty-three years they had mesne conveyances reaching down to the vendor, *held* that his title is good.

CAUSE transmitted from the Court of Equity of Stokes County, at the Fall Term, 1854.

The Plaintiffs bargained with the defendant for the land in question, at two dollars per acre, (the quantity to be ascertained by a survey) and he entered into a penal bond in the sum of fifteen hundred dollars to make them a good and lawful right and title to the same, as soon as they should pay him the purchase money: at the same time, they executed an obligation to him for the purchase money, payable as soon as the survey was made, and the sum ascertained by ascertaining the number of acres. This survey was made, and the quantity of land was found to be 403 acres, and consequently the whole purchase money was $806, of which they paid, before the bringing of this suit, $400.

The defendant commenced a suit for the remainder of the purchase money, and obtained a judgment for the same in the Superior Court of Stokes, and this bill was brought to enjoin the collection of the balance of the money, and to compel the defendant to refund what had been already paid, upon the ground that the defendant is not able to make title to the land. They also pray for general relief.

The defendant answered, admitting all the facts except the allegation that he is not able to make title. He says that the land is composed of two tracts adjoining each other, and that the larger tract, then consisting of 300 acres, was granted by the State to one William Nelson on 13th Oct. 1783, and the smaller of 150, was granted to one John Lawson on 18th of May 1789; copies of both which grants are exhibited with his answer. He further alleges that there has been a long possession by persons claiming under these patentees of more than thirty years: that one of these persons, to wit: Elisha Nelson, who was a son or a grandson of William Nelson, after thus occupying and claiming the land, (except forty acres which in the mean time had been sold off) for about ten years, conveyed the same to one John Banner by a deed of trust, a copy of which is also exhibited with the answer. Banner sold to Absalom Scales, and Scales to the defendant, by deeds properly executed to pass the title, and a copy of each is also exhibited by the defendant. The deed of the defendant to the plaintiffs for 403 acres, being the land in question, is filed in the office, and offered to be delivered whenever the remainder of the purchase money is paid. He, therefore, says that he has a good title, and has tendered such to plaintiffs. It was referred to the Clerk and Master in the Court below to "report whether the defendant, John Chandler, hath a good and secure title in fee simple to the lands mentioned in the pleadings." The Clerk and Master took testimony upon the question of title, which is sufficiently stated in the opinion of the Court, and having filed his report unfavorable to the title of the defendant, exceptions were taken to the same by the defendant, and the cause being set for hearing upon the bill, answer ex-

hibits the report of the Master, and the exceptions and the proofs filed, it was sent to this Court by consent of parties.

Miller for the plaintiff.

No counsel appeared for the defendant.

Nash, C. J. This bill is, in substance, to rescind a contract for the sale and purchase of a tract of land. The plaintiffs allege that the defendant has no title to the premises in question. Part of the purchase money was paid, and the defendant has brought an action at law to recover the remainder that was due. An injunction was granted. In his answer, the defendant avers that he has a good and valid title, and that he is ready and willing to make title to the plaintiffs. In the Court below, the case was referred to the Clerk and Master "to take evidence and investigate the title of the defendant." The Clerk made a report and returned the evidence taken by him. He reported that the defendant could not make a good title to the lands in question. As one reason for the conclusion to which he came, he states "that from the evidence of Nathaniel Shelton, Elisha Nelson purchased or otherwise secured the title of the heirs of Jacob Nelson in the 150 acre tract, with the exception, he thinks, of Polly Nelson, who married one John Morris." To this report the defendant excepted. The third exception is, that the Master's report is against the evidence, and we concur with him. The land in question consists of two coterminous tracts, and grants for each from the State are produced. It is well established, by a series of adjudications, as well in this State as in others, that from a long and peaceable possession of a tract of land under known and visible boundaries, under a claim of right, a presumption arises at common law, that the possession was rightful, and therefore, was under such deeds and assurances as are necessary to clothe it with that character. This presumption is a rule of reason and policy, intended to make men diligent in the assertion of their rights, while the evidence still exists: and in every case of such possession, the jury are instructed that from it they should presume a grant, where the existence of one is doubtful, as a matter of law. *Bullard v Barksdale*,

11 Ire. 461. The same proposition is enunciated in the case of *Reed v Earnhardt*, 10 Ire. 521: The Court say "title will be presumed from long possession." "A possession for a great many years authorizes the presumption of any thing to support the title." So in *Smith* v. *Bryan*, Bus. 182. Not only, there, does long possession raise a presumption of law of the existence of a grant from the State, but of such mesne conveyances as are necessary to make out the title. The Clerk's report shows, and the exhibits on file sustains it: that from Elisha Nelson, there is a regular chain of title down to the present defendant. *Nathaniel Shelton*, whose testimony was taken by the Clerk, and returned with his report, states that he knew the three hundred acre tract as far back as 1810 or 12, at which time William Nelson was living on it. He then states the names of a number of persons to whom the land was sold, and who took successively the possession down to Elisha Nelson, who went into possession about 1823; and he further proves that he was in possession of the 150 acre tract before 1823, and exercised acts of ownership over both tracts until he sold to Banner in 1838. *Mr. Sisk's* evidence is to the same effect, except that he says Elisha Nelson lived on the 150 acre tract eighteen or twenty years. We then have the two tracts patented, and a possession by those claiming under them (the patents) for a period of upwards of thirty years, and in Elisha Nelson of eighteen or twenty. The law presumes that such intermediate conveyances, as are necessary to complete the title in Elisha Nelson, were duly made. We conclude that the defendant, Chandler, had a complete title at the time he sold the land to the plaintiffs. The deed from Chandler to the complainants contains a general warranty, and is sufficient to convey his title.

As to Mrs. Morris, she was one of the heirs of Jacob Nelson. It is not shown that her father had any title whatever to the 150 acre tract; she, therefore, has no interest, if alive, in the present controversy.

The cause is heard on the bill and answer, the Master's report and the evidence filed by him, and upon the exceptions

filed. The report is overruled, the injunction dissolved, and the bill dismissed at the costs of the plaintiffs.

PER CURIAM. Decree accordingly.

JOSEPH G. WILSON AND WIFE *against* BENJAMIN MACE, *et al.*

Upon a question of dissolving an injunction and sequestration to prevent the removal of property from the State, the bill of the plaintiffs will be considered as an affidavit sustaining the allegations on that side; and where, in such a case, the answer of the defendants was evasive as to the allegation of the defendants' insolvency, and silent as to the charge of an intention to remove the property, and puts his rights upon a question of law, which is doubtful, the Court will continue these orders till the hearing of the cause.

Upon a motion to dissolve an injunction on bill and answer, if the answer admits the equity of the plaintiff's bill, but brings forward a new fact in avoidance, the injunction will be continued to the hearing.

APPEAL from an interlocutory order by his Honor Judge BAILEY, at the Fall Term, 1854, of the Court of Equity of Guilford County.

The defendant's counsel moved to dissolve the injunction and sequestration heretofore ordered in this case, and upon considering the matters set out in the bill of the plaintiffs (which was sworn to) and the answers of the defendants, his Honor decreed accordingly. Whereupon, the plaintiffs prayed and obtained leave to appeal to this Court.

The facts of the case are sufficiently stated in the opinion of the Court.

Morehead for the plaintiff.
Miller for the defendant.

NASH, C. J. The bill is filed for an account of the estate of Francis Mace, in the hands of the defendant Benjamin Mace, his administrator, and against the other defendants, who, it is alleged, have in their possession specific portions of the estate of the intestate, and to enjoin all the defendants from removing from the State any of the slaves belonging to

the intestate. An injunction and sequestration were issued, and on the coming in of the answers, the injunction was dissolved, and the sequestration taken off. In this decretal order, there is error. The plaintiffs are a portion of the next of kin of Francis Mace, deceased, and charge that the slaves, mentioned in the bill, were of the estate of the intestate, and that the defendant, Benjamin Mace, was duly appointed his administrator, and, as such, took into his possession a number of slaves: that he is squandering the assets, and has no property but his interest in these slaves, and is considered insolvent: and threatens to remove the slaves beyond the jurisdiction of the State. They further charge that the defendant, Henry Mace, also one of the next of kin of Francis Mace, possessed himself, by the consent of the administrator, of several of the slaves, among whom was a negro man by the name of Nathan, and who, by a fraudulent contrivance between Henry Mace and Joab Hiatt, has passed into the possession of the latter. The charge is that the plaintiff Wilson, having got Nathan into his possession, refused to give him up to Henry Mace, whereupon the latter sued a writ of replevin, and at the Term, to which it was returned, the defendant, Henry Mace, pretended to borrow of Joab Hiatt $800, for which he gave his note and immediately confessed a judgment upon it, and execution issued which was levied on Nathan and he sold, and Joab Hiatt became the purchaser. All this was done at the return Term of the replevin. In his answer, Benjamin admits he took the slaves into his possession as administrator of his father, but alleges they did not belong to his father's estate: He further alleges that the negroes had been divided, and that those he had in his possession, had been assigned to him, and relies further upon the length of time he has been in possession. Henry Mace sets up the same defence in substance, and further admits that the defendant, Joab Hiatt, got into possession of the slave Nathan in the manner set forth in the bill, but denies that there was any fraud contemplated by him or Hiatt: but that he did actually borrow the money from Hiatt, and the mode pursued was adopted to secure to himself the value of Nathan. Hiatt avers that the transaction was *bona fide:* that he did lend the money to Henry Mace, and that the latter did not return it..

We are not trying the case, but are examining the correctness of the interlocutory order dissolving the injunction, the defences therefore set up by the answers, cannot be examined: they will come up on the final hearing. The principles which govern the question, now under consideration, are fully examined by Judge PEARSON in delivering the opinion of the Court in the case of *Loyd* v. *Heath and others*, Bus. Eq. R. 41. After stating the difference between common and special injunctions, he proceeds—

"In the other, (that is the latter) a different rule is acted on, and in as much as to dissolve the injunction would be to allow the injury to be done, and in the forcible words of one of the Chancellors, *a tree that is cut down cannot be made to grow again.* When the plaintiff fails to elicit from the defendant a discovery which admits the allegations of the bill, the bill is allowed to be read as an affidavit on the part of the plaintiff, and, if upon the whole case, the matter is left in doubt, the injunction will be continued until the hearing, so as to give the plaintiff a chance to support his allegations by proof before a thing, the consequence of which is irreparable, will be allowed to be done."

Apply the principle thus announced to this case: The defendant, Benjamin Mace, admits he took the slaves into his possession as the administrator of his father, but denies that they were his property. Whether upon the hearing, he can avail himself of such a defence, we are not now called on to decide: it is sufficient for our present purpose, that he has raised the question. It throws the case into a state of doubt. So, also, as to the division: whether it ever took place, we have no means to ascertain. The bill charges that the defendant is generally regarded as insolvent, except the interest he may have in these slaves: that he threatens to run them from the State, or to sell them, if any one sets up a claim to them. The latter part of this allegation he does not answer, and as to the first part, his language is, "but he denies his insolvency, or that his condition, as to property is such as to be any matter of concern, inasmuch as he has paid and settled with complainants, years ago, for every cent that he owed them,

and that he owes and is accountable to them for nothing."—It is too evident that the answer is evasive as to his insolvency, and altogether silent as to his threat of running the slaves out of the State. In the cases of *McDaniel* v. *Stoker*, 5 Ire. Eq. 274, and *Griffin* v. *Carter*, ibid 413, it was *held* that, on a motion to dissolve an order, restraining a defendant from running slaves out of the State, that the bill might be read as an affidavit, and as it appeared, taking the whole together, that the question was doubtful, inasmuch as the slaves were within the control of the Court, they should be kept so until the final hearing.

Our case is a stronger one than either of the two last, referred to. Here the defendant, Benjamin Mace, gives no answer to the allegation of the threat and palpably evades the charge of insolvency. The defence of Henry Mace is so mixed up with that of Benjamin, that the latter has adopted his answer to a certain extent as his. It must share the same fate. He sets up the alleged settlement which is denied by the bill: there is, then, oath against oath, and there is no power in the Court, on the present question, to decide it. Hiatt, if not a necessary party, is properly made one. He has knowingly mingled in the strife between these parties, and by means, strongly suspicious, has got into his possession one of the slaves to wit, Nathan. He is, therefore, properly a party defendant.

There is another principle involved in this case, which shows that the injunction ought to be continued to the hearing. In one part of the answer, the defendant admits that he took possession of the slaves as the property of his father, as his administrator, but he denies that he is bound to account for them as he, many years ago, settled with complainants and paid them all they were entitled to of the estate, and pleads the receipts given by them. It is a rule in equity that where a defendant in answer to an injunction bill admits the equity charged in the bill, but brings forward a new fact in avoidance of it, the injunction must be continued to the hearing. *Strong* v. *Menzies*, 6 Ire. Eq. 544. *Deaver* v. *Erwin*, 7 Ire. Eq. 250.

Several other matters of defence were set up in the answers, and others urged in the argument before us, but none of them came up before us upon this investigation. When the cause is heard, the Court will then decide whether length of time, or want of proper parties or multifariousness, will protect the defendant.

The injunction and sequestration ought to have been continued until the hearing, and the order for their dissolution must be reversed. This opinion will be certified. Defendants must pay the costs of this Court.

PER CURIAM. Decree accordingly.

SAMUEL WEBBER AND SUSAN HIS WIFE *against* BENJAMIN TAYLOR.

Where a purchaser might see from his title deed, that his vendor had given less than one sixth of what he was giving for the same land, it was a circumstance to put him upon an inquiry, and coupled with the fact that there was another in possession than the person he was buying from, it was *held* that the purchaser under such circumstances had a notice of the prior equity of the plaintiff: sufficient at any rate to induce a Court to continue an injunction against defendants entry under a judgment and execution at law.

APPEAL from the Court of Equity of Greene County, at December Term, 1854.

The appeal was taken from an interlocutory order made by his Honor dissolving the injunction heretofore granted, and the case presented by the bill and answer, is sufficiently stated in the opinion of his Honor.

No counsel for the plaintiffs in this Court.

J. W. Bryan for the defendant.

NASH, C. J. The bill alleges that Susan Webber, one of the plaintiffs, was the owner, in her own right, of a tract of land, which, after her intermarriage with the other plaintiff, Samuel Webber, it was agreed between them, should be conveyed to one Spiers Witherington, for the purpose of being sold, and that the money arising from the sale, should be placed in the hands of Thomas Moore, for the sole and separate use of the said Susan. All of which was accordingly done, and the pur-

chase money amounting to $87, was by the said Witherington, delivered over to the said Moore, who agreed to hold it on the trust above stated. The bill further charges that the plaintiff, Susan, purchased from Mrs. Rebecca Hart the tract of land now in contest, and on which she and her husband were then living, and where they continued to live, and now live, for the price of $135, and to make up this sum, the said Thomas Moore paid over to her agent, M. Barret, the sum of $87 so in his possession belonging to the plaintiff, and she paid the balance, $48 of her own money. It is further charged that the plaintiff, Samuel, being indebted to one Edward Carman, in the sum of $30, the land was, with her consent, conveyed to him, she joining in the conveyance. That though the deed was absolute on its face for the full sum of $135, it was intended only as a security for the money due him, Carman, and that no money was paid; that she offered, subsequently, to pay to him the amount of his debt, and demanded a reconveyance which he declined to make. Subsequently, Carman conveyed the land to the above named Thomas Moore for $30, which she paid him, but he refused to reconvey it to the plaintiff unless she would consent to pay to him a debt of $50 due to him from the plaintiff, Samuel. A reconveyance from Moore was demanded, with an offer to pay him the sum he claimed, which he refused, and afterwards, in December 1852, sold and conveyed the land to the defendant for the sum of $200: and the plaintiffs charge, that Taylor, at the time of his purchase, had full notice of their equitable title. From him a reconveyance was demanded. They further show that the defendant has instituted a suit in ejectment, and recovered a judgment, as they could make no defence, and threatens to turn them out of possession. An injunction issued according to the prayer of the bill.

The defendant admits his purchase and the amount paid, but alledges he is a purchaser without notice of the equity which the plaintiffs claim, and without any knowledge of the alledged promises of Carman or Moore. He admits that at the time he purchased the land, he knew that the plaintiffs

were living on it, but he supposed and believed that they were living there as the tenants at will of Thomas Moore.

Upon the coming in of the answer, the injunction was dissolved, and the plaintiffs appealed to this Court.

The deed to Carman from the plaintiff, was executed in October 1850.

Our sole inquiry, at present is, whether there is error in the interlocutory decree dissolving the injunction. The equity of the plaintiffs claim, rests upon the alledged knowledge of the defendant of its existence at the time of his purchase. It is a rule in Equity that a purchaser, taking with notice of a prior equity, takes subject to that equity, for he shall be assumed to have contracted for that only, which the owner could honestly transfer, namely, his interest, subject to the equity, as it existed at the time of the notice. Thus a purchaser from a trustee with notice, becomes himself a trustee. This is a well known principle of equity jurisprudence, and is not questioned in this case. The only difficulty, some times, is, in ascertaining what degree of information will amount to notice. It is not essential that the notice should be given to the party himself, notice to his agent is sufficient. Where it is by actual information, there can be no difficulty, or where the purchase is made during the pendency of a suit. But it is not necessary, in order to charge a purchaser, that he should have *actual information* of the equity. He may be affected with notice by information of the existence of any fact or instrument, relating to the subject matter of his contract, which, if properly enquired into, would have led to its ascertainment. For instance, says Mr. Adams, p. 158, "if the defendant purchases land which he knows to be in the occupation of another than the vendor, he is bound by all the equities of the party, who is in the occupation. So, if he knows of any instrument forming directly or presumptively, a link in the chain of title, he will be presumed to have examined it; and therefore, to have notice of all other instruments or facts, to which an examination of the first could have led him." Whatever, in fine, is sufficient to put a person on inquiry, in relation to prior equities, is considered in equity, equivalent to notice. *Hawley* v. *Cra-*

mer, Cow., 717, *Pearson* v. *Daniel*, 2 Dev. and Batt. Eq. 360; *Benzien* v. *Lenoir*, 1 Dev. Eq. 225. Let us apply these principles to the case before us. The defendant is charged with being a purchaser, with notice of the prior equity of the plaintiff. The bill charges, that at the time the plaintiff Susan, made her purchase of the land from Mrs. Hart, the plaintiffs were in the actual possession of the land, and that they so continued, up to this time. The defendant admits that when he made *his* purchase, he knew the plaintiffs were so in possession, "but that he thought and believed they were there as *tenants at will to Moore*." This brings him expressly within the operation of the principle, as stated by Mr. Adams. Here was an occupancy of another than his vendor, Moore. Why did he not enquire upon what ground or title they held their occupancy? He gives us no reason why he believed them tenants at will of Moore. Why tenants at will rather than tenants for years? The latter is far more frequent than the former. Was it the relation of mortgagor and mortgagee that suggested that species of tenancy? But again, it is alledged in the bill, that the conveyance from Carman to Moore, set forth the consideration money to be $30: this is not denied in the answer. That was the title deed of Moore under which he claimed the land; it was not a link in the chain, it was the chain itself. Equity, therefore, will presume that he did examine it. He there saw that Moore had given but thirty dollars for a tract of land, which he was selling to him for more than six times that amount; and, at the same time, he knows that others are in actual occupancy of the premises. This is not negligence, which in itself is not notice, nor is it fraud, but it is strong evidence of it: so strong, that nothing in the answer repels it. We are driven to the conclusion, that though the defendant, Taylor, may not have had actual information of the alledged prior equity of the plaintiffs, the circumstances were such as to put him on enquiry, which is considered in Equity as equivalent to notice.

With the equities set forth in the bill, we have at present, nothing to do; they are charged in the bill and not denied in the answer. The defendant rests his defence, in the present

enquiry on his being a purchaser for a valuable consideration without notice. Being of opinion, that the defendant is a purchaser, with notice of whatever equities were in the plaintiff, Susan Webber, his Honor erred in dissolving the injunction.

The injunction must be continued to the hearing, when the parties will be put to their proof.

The interlocutory order is reversed, and the defendant must pay the costs of this Court. This opinion will be certified to the Court of Equity of Greene County.

PER CURIAM. Decree accordingly.

RICHARD BRADLEY and OTHERS *against* MARY M. GIBBS and OTHERS.

The office of a codicil ordinari y, is to vary, by adding to or taking from a will, but not wholly to supplant it.

In construing a codicil in reference to the will, the leading and controlling object is, as it is in construing the will itself, to ascertain the intention of the testator.

CAUSE removed, by consent, from the Court of Equity of New Hanover County.

The bill was filed by the executors of Robert Gibbs, to obtain the advice of the Court as to the purport and meaning of the will of their testator, and the codicil thereto appended.—The portion of the will on which the question arises, is as follows:—

Seventh. "After the payment of all my debts as aforesaid, 'I will and desire that all the rest and residue of my estate of 'every kind, shall be divided into nine equal parts, of 'which my beloved sons Philip H. Gibbs, Robert W. Gibbs 'and George McK. Gibbs, shall draw and be entitled to one 'share each: the remaining six shares to be kept together in 'the possession of my beloved wife, for the support of herself 'and her children, and to be divided off to them when and as 'she may find it convenient to do so."

To the will is added, of the same date, a codicil which is as follows: "The several shares which shall fall to my daughters in the division of my property, I give, devise and bequeath to my friends and relatives, Richard Bradley, William B. Gibbs and Robert W. Gibbs, and to the survivors of them and to the heirs, executors and administrators of such survivors, in trust for the sole and separate use of my daughters, free from all dominion and control of any husband or husbands which they or either of them have now, or may hereafter have, and of all and all manner of responsibility for their debts: and I do hereby will and direct, that it shall and may be perfectly discretionary with the trustees, herein named, either to suffer and permit all, or any of my said daughters, or all or any of their husbands to have the possession, and receive, use and enjoy the rents, issues and profits of the property allotted to them, or else to retain the management and control of the same in their hands and pay over annually, the hire and profits thereof, to my daughters or their husbands."

The executors submit, that having paid all the debts of the estate, the only remaining duty they have to peform, is to pay over the surplus of the estate to the persons entitled thereto: but from the apparent conflict between the will and the codicil, they are at a loss, and pray the advice of the Court whether they are to deliver the property over to the widow for her to dispose of as she thinks proper, or whether they are to deliver the same to the trustees for the benefit of the daughters as provided in the codicil?

The daughters answer, submitting to the direction and advice the Court may give.

The widow, Mrs. Gibbs, insists that, by the true and proper construction of the will and codicil, the executors are required to deliver the property to her for her support, and for her to give off to the daughters as she may choose, and that when thus given off, the provisions contained in the codicil attach, and not before.

The cause was set for hearing upon the bill, answers and exhibit, and sent to this Court.

No counsel appeared for the plaintiffs.

W. A. Wright, for the defendants.

BATTLE, J. The sole question presented for our consideration by the pleadings is, to what extent the disposition made of the residue of his estate by the testator, in the second clause of his will, is effected by the codicil which he annexed thereto. The widow contends that the shares to which her daughters are entitled under the said clause, and which are thereby directed to be kept in her possession, for the support of herself and her children, until she shall find it convenient to divide them off, were not intended by the codicil to be taken from her immediately and invested in the trustees therein named for the purpose therein declared, but were to be so invested for such purposes, whenever she should think proper to divide them off. The executors say that a contrary construction of the operation and effect of the codicil had been suggested, and they seek the advice of the Court upon the question thus raised. We have no hesitation in saying that the construction contended for by the widow, is correct. A codicil is a supplement to a will, or an addition made by the testator, and annexed to one, to be taken as a part of a testament, being for its explanation or alteration, or to make some addition to, or subtraction from the former disposition of the testator. 2 *Black. Com.* 500: *Williams on Ex'rs.* 8. Hence it is said that a codicil may vary, by adding to or taking from the will, but is not wholly to supplant it. *Jarman on Wills* 160. In construing a codicil in reference to the will, the leading and controlling object is, as it is in construing the will itself, to ascertain the intention of the testator. So far as a purpose to vary the will, either by adding to or subtracting from it, can be discovered, that purpose, if a lawful one, is to be carried out, but the intention of the testator, as declared in his will, is not to be varied further than is necessary to carry out such purpose. In the will before us, the codicil was written on the same day on which his will was executed, and was introduced under a *nota bene*. The testator seems to have reflected that under the will which he had just published, the shares of the residue of his estate to which his daughters would become enti-

tled, might come to the hands of their husbands and be spent by them, or be liable to the payment of their debts. Against that result, he determined to provide, by annexing to his will the codicil in question, by which he directed the shares of his daughters to be vested in trustees for their sole and separate use. We cannot see that he had any other object in view, and we feel almost sure, that if he had desired his daughters shares to be taken from the possession of their mother, before she should find it convenient to divide them off, he would have expressed himself to that effect in plain language, instead of leaving it as a matter of mere conjecture. A decree may be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

EDMUND McQUEEN AND JAMES H. McQUEEN, EXECUTORS, *against* JAMES S. McQUEEN AND OTHERS.

Where a father in his will alludes to an expectancy that the children born to him of one marriage had of a legacy from their maternal grandfather, and provides that should these children get property from this source, it was to be divided in certain proportions between all his children, (including those of another marriage) and postpones the division of his own property for two years, and within that time property does come to these children by the death of their grand father, *held* that this is a case coming within the principles that constitute the doctrine of *election*.

Where the persons put to an *election* by a bequest, are infants, the Court will order a reference to the master to enquire concerning the relative values of the two interests, and will direct the election to be made of that, which shall appear the more advantageous for them.

Where a legacy to an infant is charged with the payment of a sum of money, the Court of Equity will order a reference to the master, to ascertain whether it will be to the infant's advantage to accept of the legacy with the burthen, and will direct according to such ascertainment.

CAUSE transmitted from the Court of Equity of Richmond County, at the Spring Term, 1854.

The executors of Archibald McQueen filed their bill praying for advice and directions as to their duty in distributing

the estate of the testator under the following provisions in the will:—

"*Item* 1. It is my desire that my daughters and sons shall receive of my estate in the following proportion: my daughters to have three portions, and my sons two portions of all the estate not hereafter excepted.

"*Item* 2. Inasmuch as I expect that my children, Archibald Alexander, John Knox, Almina Diana, Julia Catharine and William McLeod, may receive property from their grandfather, William McLeod, it is my wish and desire, and I enjoin it as a last request, that whatever *such* property may be, it shall be estimated in the proportion of *three* and *two*, specified in the above article, so as to carry out this *my division.*

"*Item* 3. I authorise my executors, should they at any time deem it advisable, to sell my property at Floral College, and also my plantation at Shoe Heel, known as the McBryde place, all of which I devise to my said executors in trust for that purpose, and I direct that the proceeds be divided in the proportion specified in article first.

"*Item* 4th. (Not necessary to be set out.)

"*Item* 5th. It is my wish and desire, that at the end of two years from the probate of my will, my executors shall apply to the Court of Pleas and Quarter Sessions for the County of Robeson and have a committee appointed by the Court to make *a division* of my estate between such of my children as shall then be of age and those who are minors, observing the proportions above specified, giving to the adults their share in severalty, and leaving to the minors their estate as tenants in common, to be managed by a guardian, who I desire shall be appointed for that purpose as soon as practicable after the division is made. * * * * * * * * "

Dated 28th of May 1851. To this will is attached the following *codicil:*

"In addition to my will above, it is my desire to add the following items: It is my desire that whatever moneys come into the hands of my executors from the profits of the farm, moneys collected or negro hire, be applied to the education of my younger children; and it is my earnest desire that their

education be not neglected. I desire that my Kingsboro' farm, adjoining the lands of Dr. John Malloy, be retained as a common home for my dear children, so long as they may think proper to remain on it: and should they leave it, that then it shall be the property of my youngest son, William McLeod, should he survive; but that he pay to his brothers and sisters one half the estimated value thereof, in the proportion mentioned in the first article of my above will; except that I desire my son, Archibald Alexander, to receive one hundred dollars above either of the others." Dated 30th May 1851.

Before the time arrived for the division of the testators estate, under his will, William McLeod, mentioned in the foregoing as the grandfather of some of these children, died, having made his will, in which, among other things, he bequeaths as follows:—

"Unto my grand sons, Archibald Alexander and John Knox McQueen, I give and bequeath my negro woman Lydia, and her four children, Martha, Sandy, Amanda and Leston, together with all their increase. I also give them my negro boy John. Unto my grand children, Almina Diana, Julia Catharine and William McLeod, I give my negro woman Sarah and her child Henry, with their future increase. Also, my negro woman Eliza, and her daughter Mary."

The testator, Archibald McQueen, was married three times. James S. and Flora Bunting are the issue of his first marriage, and are of full age. His second and third wives were the daughters of William McLeod above named, and Archibald Alexander and John Knox, are the issue of one of these marriages, and Almina Diana, Julia Catharine and William McLeod McQueen, are the issue of the other, and are all minors.

The questions propounded by the pleadings are sufficiently apparent from the opinion of the Court.

The cause was heard upon the bill and answers and the two exhibits, (the wills) filed.

Kelly for the plaintiffs.
Banks for the defendant.

Battle, J. The difficulties suggested by the pleadings as

to the construction of the will and codicil of the plaintiffs' testator, do not arise so much from ascertaining what his intention is, as from determining whether it be in accordance with law. He declares in terms, which cannot be misunderstood, that all his property with certain specified exceptions, shall be divided between all his children, but in certain proportions between his sons and daughters, and that such division shall be made at a certain time. He then, after expressing the expectation that the grandfather of his children by his last two wives, (who were sisters) would give them some property, declares in unequivocal language that such property is to be taken into the account and divided among all the children in the proportion above specified. The only question upon this part of the will is, whether the equitable doctrine of election applies? and we do not hesitate to say that it does. To originate this doctrine, two things are said to be essential: First, that the testator shall give property of his own; and secondly, that he shall profess to give also the property of his legatee or devisee. *Adams Eq.* 93; *Wilson* v. *Arny*. 1 *Dev.* and *Bat. Eq. Rep.* 376. The present case would be directly within the rule, if William McLeod had died in the life time of the plaintiffs' testator, so that the property which he bequeathed to his grand children had become theirs in the life time of their father. Can it make any difference in principle that the property was not acquired by the five younger children of the testator in his life time, though it did become theirs prior to the time fixed upon by their father for the division of his estate? The counsel for the younger children contend that it does make a difference, and for it cites the case of *Owen* v. *Owen*, Bus. Eq. Rep. 121. The argument is, that the testator cannot assume to dispose prospectively of property which may or may not become vested in his legatees or devisees, so as to put them to an election. But we think that the principle upon which the doctrine of election is founded, will apply to that case as well as any other. It is this, "that one who takes a bounty under an instrument, is under an obligation to give effect to the whole instrument, or rather that the donor intended that he should not enjoy that bounty if he disappointed that

bestowed on another in the same instrument." The case of *Owen* v. *Owen*, instead of militating against, rather confirms this view. The decision was, that as a period for the division of his property between his wife and children was fixed by the testator, the Court could not postpone that division for an indefinite period to await the uncertainty, whether one of the children should get any property from her grand father, who was then living. The Court abstained indeed from expressing any positive opinion upon the effect which the daughters getting property from her grandfather might have produced, but from the manner in which they expressed themselves, it may at least be inferred, that they thought it would have been taken into account, had she received it before such division was required to be made.

That the parties who are required to elect in this case are infants, will not prevent an election from being decreed. *Robertson* v. *Stephens*, 1 Ire. Eq. 247. The Court will in such cases refer it to the master to enquire and ascertain the value of both interests, and then direct what election shall be made. *Adams Eq.* 96. *Gretton* v. *Howard*, 1 Swan's Rep. 409.

The second and only remaining question arises upon the codicil. There can be no doubt of the power of the testator to provide for the disposition of his Kingboro' farm in the manner specified. It is admitted by all the parties, that it has been abandoned, and will never be occupied again as a common home. Were the parties all adults, there could be no question but that William McLeod McQueen would be entitled to take the farm upon paying one half of its estimated value to his brothers and sisters in the proportion mentioned. But as minors cannot make any admission to their prejudice, a reference must be made to ascertain the facts, and enquire whether it would be to the advantage of the minors to occupy the farm as a common home? A decretal order may be drawn in accordance with this opinion, and the cause will be retained for further directions upon the coming in of the report.

PER CURIAM. Decree accordingly.

KATY MILES *against* MELTIA MILES.

Under the fifth section of the act of Assembly concerning "Divorce and Alimony," (Rev. Stat. ch. 39, sec. 5,) a cause cannot properly be sent to the Supreme Court, until the material facts charged, shall have been found by the verdict of a jury.

PETITION FOR ALIMONY transmitted from the Court of Equity of Stanly County, at the Fall Term, 1854.

The case sufficiently appears from the opinion of the Court.

J. H. Bryan and G. C. Mendenhall for the plaintiff.

No counsel appeared for the defendant.

PEARSON, J. This is a petition in Equity, under the 3rd sec. of the 39th ch. of the Revised Statutes, by a wife, for alimony.

The plaintiff alleges that her husband "frequently offered personal violence to your petitioner, and wholly abandoned and deserted his family, who were in great poverty and distress for the necessaries of life," "that your petitioner and her husband have not lived together as man and wife for the past six years, and have not so much as spoken to each other for the past two years, all of which is without any just cause on his part." She then alleges that her father has lately died intestate, whereby she has become entitled to a distributive share of his estate. The administrator is made a party, and the prayer is for alimony, and that her husband be enjoined from receiving the distributive share. The administrator answers and submits to an account. The husband answers and denies that he ever offered personal violence to the plaintiff, or that he abandoned and deserted his family; on the contrary, he alleges that she is a lazy, dirty woman, and although able bodied, and in good health, so far from working to assist him in supporting the family, she wasted his hard earnings; and when he happened to be taken sick while working from home, and was confined for many weeks by a dangerous disease, instead of coming to see him, she took occasion to desert their home, and after his recovery, she refused to come back and live with him, and actually refused to speak to him on several

occasions, when he sought an interview with the hope of bringing about a reconciliation.

There was replication, commissions and depositions taken on both sides, and the cause was *then set for hearing*, and transferred to the Supreme Court for trial by consent.

The cause is not properly in this Court. In the 5th sec. of the statute, "Divorce and Alimony," it is provided that in all suits commenced under this act, the material facts charged in the petition, shall be submitted to a jury, *upon whose verdict, and not otherwise, the Court shall decree; any rule or practice to the contrary notwithstanding.*" So, a cause of this kind, cannot be heard except upon *the issues* found by the verdict of a jury; of course it cannot be set for hearing except upon petition, answers and the *issues found*; and the order setting it for hearing upon the petition, answers and proofs taken, was improvidently made. So the cause was not in a condition to be transferred to this Court for trial, and must be remanded to the end that the parties may proceed as they may be advised.

Perhaps, it is proper to call the attention of petitioner's counsel to the fact, that there is no allegation of "the three years residence of the parties in this State." And there may be a question whether a wife can sue for alimony under the 3d sec. of the statute, unless she also prays for a divorce from bed and board. There is no allegation that the husband is an habitual drunkard or spendthrift, to bring the case under the 4th sec.

PER CURIAM. Decree.

A. C. FREEMAN *against* FANNY MOSES AND OTHERS.

Where a contract in writing, made in contemplation of marriage, and signed by the intended husband and wife, does not expressly exclude the intended husband, but gives him a joint use in the property with the intended wife during her life, she is not such "a free trader" as to make her bond obligatory on her in Equity, although the debt was contracted upon the faith of the property contained in the settlement.

CAUSE removed from the Court of Equity of Stanly County.

The deed, upon the construction of which this case rests,

reciting that a marriage was about to take place between Frances Adderton and Amram Moses, and that the intention of the parties was to have the estate of the wife, real and personal, settled and secured to her, so that it should not *absolutely and exclusively vest in the said Amram* by virtue of the intended marriage, conveyed to the defendant Harris, as trustee, all the estate and property of the said Frances, consisting of land, negroes and other personal property: in trust, however, that in the event of the said marriage taking place, "the before mentioned property shall return to their possession and be enjoyed and used by them during the natural life of her, the said Frances;" and further, "that in case the intended husband should survive, the property should go to the *heirs at law and distributees* of the said Frances." On account of a supposed defect in the title of the trustee, from the want of registration, this deed was treated as invalid by the other creditors of Moses, and all the personal property was sold to satisfy executions obtained against him. The land, however, was believed to be protected under the act of Assembly, and was still in the possession of Moses and wife.

The plaintiff, in his bill, recites the above facts, and alleges that Mrs. Moses was the principal in a bond to one Earnhardt, and that he, at her instance and request, and relying on the separate estate thus secured to her by deed, signed the said note to Earnhardt as surety, which was also signed by Moses: that he has been compelled to pay the money to Earnhardt, and he prays that he may be reimbursed out of the land still in the possession of Moses and his wife.

The defendants answered, and proofs were taken, but as the case turns upon the construction of the marriage settlement, it is not deemed important to set the same out at large.

The cause was set down for hearing, and sent to this Court by consent of parties.

H. C. Jones for plaintiff.
G. C. Mendenhall for the defendants.

NASH, C. J. The bill is filed to subject the property of the defendant, Mrs. Moses, to the payment of the bond set forth

in the pleadings. Mrs. Moses is a married woman, and was so at the time she signed and executed the bond; and the whole question may be put upon the proper construction of the marriage settlement which was executed by Mrs. Moses and Amram Moses, before their intermarriage. The plaintiff contends that by that instrument, the whole of the property of Mrs. Moses, then Mrs. Adderton, both real and personal, was conveyed to Mr. Harris, one of the defendants, to hold for her sole and separate use. The wording of the deed of trust is peculiar. It recites that a marriage was about to be consummated between Fanny Adderton and Amram Moses; it then proceeds, "and whereas the said Frances is desirous of having her estate, both real and personal, settled and secured in manner and form herein after mentioned and more particularly described, *so that it shall not absolutely and exclusively* vest in the said Amram by virtue of the marriage," &c. In setting out the uses of the deed, it proceeds "in trust, nevertheless, that in the event of the aforesaid marriage, between the said Frances and Amram, the before mentioned property shall return to their possession, and be enjoyed and used by them during the natural life of the said Frances, if the said Amram should survive her, the said Frances." It then provides for the disposition of the property should Amram survive her; which Amram covenants to perform. Does the deed convey to Mrs. Moses a separate estate to her own separate use in the property conveyed? We think it does not. The question here is not whether a feme covert, to whom property is conveyed to her own separate use, can so bind herself as to subject her separate estate: of that we do not enquire. There can be no doubt that the debt sought to be enforced against the property was contracted, so far as Mrs. Moses is concerned, upon the the faith of it. Still the question recurs, did the conveyance or settlement constitute her a free trader? Unless it does, the obligation is inoperative and void as to her: she had no power to bind herself. No words of art are necessary to secure property to the sole and separate use of a married woman: it is the intention of the parties to exclude the husband which ought to govern: but this intention must be clearly and un-

equivocally expressed. The husband cannot be deprived of his *jus mariti* "without plain recorded words or necessary implication." *Rudisell* v. *Watson*, 2 Dev. Eq. 430. See also, *Ashcraft* v. *Little*, 4 Ire. Eq. 238. It will not do to guess.—There is nothing in this settlement to show that the property embraced in it was intended to be conveyed to the sole and separate use of Mrs. Moses to the exclusion of her intended husband: the contrary is apparent. In the preamble, the intention is expressed to be for the purpose of preventing Amram Moses from having the *absolute and exclusive* right to it. So far then, from the intention being, as gathered from these words, to secure the property to the sole use of the wife, to the exclusion of the future husband, it secures to him a joint use with her.

But the operative part of the deed, where the uses are declared, leave no doubt upon the subject. If the marriage does take place, the property is to return to them (the said Frances and Amram) and be *enjoyed and used* by them during the natural life of Frances. An interest in the property during her life is secured to her husband, and she has not a sole and separate use in it. She is not a sole trader, and the bond sought to be enforced against her, is, as to her, void. Supposing this doctrine to apply to personal property, as this bill seeks to subject the land of Mrs. Moses, it is not within the operation of the rule. The bill dismissed with costs.

PER CURIAM. Decree accordingly.

HEMAN H. ROBINSON ADM'R *against* DAVID LEWIS.

A petition to rehear a cause in this Court, is too late after a decree has been signed and passed.

PEARSON, J. Where two years have elapsed after the forfeiture of mortgaged personal property, the right of redemption is barred, although the mortgagor died before the forfeiture, and suit was brought within two years from the appointment of an administrator.

Petition filed at this Term, upon notice to the defendant, to rehear a cause decided at December Term, 1852, of this Court. (Bus. Eq. 58.)

Troy for the plaintiff.
D. Reid for the defendant.

Pearson, J. The decrees of this Court are not enrolled, but are recorded, which is allowed to have the same effect, and the decree is considered to be enrolled as of the Term at which it is passed. *American Bible Society* v. Ex'rs of *Hollister*, ante 10. In the petition to rehear, *Moye* v. *May*, *ibid* 84, the decree had not been signed and passed, and it is said, "if that had been done, the petition would certainly have come too late": and a doubt is intimated whether, when the decision is, simply, that the bill be dismissed, a decree to that effect will not be considered as having been signed and passed at the Term when the case is decided, although in fact it was not signed and passed.

In this case, the decree was in fact signed and passed at December Term, 1852, and the petition was not filed until December, 1853: So it certainly came too late, and must consequently be dismissed.

Per Curiam. Decree accordingly.

As the case was not argued for the plaintiff on the hearing, I will notice the objection taken by his counsel on the argument of the petition to rehear the part of the decree which is made the subject of complaint, that is, that the plaintiff having failed to perform the condition, and having omitted to file his bill to redeem for the space of two years after the forfeiture, is barred of all claim in Equity, notwithstanding the mortgagor died a few days before the forfeiture, and the plaintiff did not administer upon his estate until nine months afterwards.

The position taken is, that the *two years* did not commence to run until the plaintiff was appointed administrator, and the argument to support it is, "the statute of limitations does not begin to run against an administrator until the time of his ap-

pointment, if the cause of action did not accrue in the life time of the intestate; here the forfeiture did not take place in the life time of the mortgagor, therefore the statute did not begin to run until the appointment of an administrator." This is *a non sequitur*.

The statute of limitations in regard to bringing actions, fixes on the time when the cause of action accrues as the time when the statute shall begin to run. If the cause of action accrues *before* the death of the party, the statute begins to run, and there is no proviso to stop it, except in cases of reversal or arrest of judgment; extended by construction to non-suits, and to cases where an action is pending at the time of the death of the plaintiff, and a new action is commenced within a year (2 *Saunders Rep. 63, note*), and cases where new promises are made. This gives rise to the general rule, "where the statute begins to run it continues to run." But where the cause of action accrues *after* the death of the party, the Courts adopted the construction that the statute did not begin to run until there was a personal representative, upon the idea that a cause of action could not accrue until his appointment, because "a cause of action cannot exist unless there be also a person in existence capable of suing." *Murray* v. *East Ind. Co.*, 7 Eng. C. L. Rep. 66. The Courts were the more inclined to this construction by reason of the proviso above alluded to, and the proviso in favor of persons who were infants, femes covert, &c., when the cause of action accrued.

It has since, oftentimes, been said that this loose construction has given rise to much litigation which it was the intention of the statute to bar.

The statute of limitations now under consideration, fixes on the time of *forfeiture* as the time when the statute shall begin to run: this time is set out in the mortgage deed. The mortgagor has a legal right to have back the estate by performing the condition at any time before or on that day. If he neglects to do it, and happens to die a *few days* before the time of forfeiture, there is no conceivable ground upon which the forfeiture can be postponed until the appointment of a personal representative: or upon which to justify a construction

by which the statute is not to begin to run from the time of the forfeiture. There is no proviso or saving clause in the statutes to aid the suggestion. In truth, the negligence is greater where he fails, during a long time, to perform the condition and dies a few days before the forfeiture, than if he had died a few days after the mortgage was executed.

The distinction between the two statutes is clear: the time in one is uncertain, and is left to depend on circumstances: in the other, it is certain and absolute. It may be remarked, also, that this statute is addressed directly to Courts of Equity as a bar to the equity of redemption, and does not depend on any analogy drawn from the statute limiting the time for bringing actions at law.

CHARITY AND MARGARET KISER *against* JOHN KISER.

A bequest of slaves to C. (a married woman) and after her death, and the death of another, to *fall to her heirs*, there being nothing in the context to vary the meaning of the language from its legal purport, was *held* to be within the rule in Shelly's case, and to give the absolute property to the husband of C.

The word *heirs*, when applied, in a will, to personal property, means those who take by law or under the statute of distributions.

Cause removed from the Court of Equity of Forsythe County, at the Fall Term, 1854.

The bill in this case, was filed to prevent the defendant from sending the slaves in question, beyond the limits of the State. The slaves having been seized under a writ of sequestration, the defendant gave bond for their forthcoming, and at the return term of the writ, filed his answer, claiming the right of property in these slaves. The only question in the case, arises out of the fifth clause of the will of Casper Stoltz, under which both plaintiffs and defendant claim title to the property, which is fully set out in the opinion of the Court. The cause was set for hearing on the bill, answer and exhibit, and sent to this Court by consent.

No counsel appeared for the plaintiffs in this Court.
Miller for the defendant.

PEARSON, J. Casper Stoltz bequeathed as follows: "*Fifthly.* I will and bequeath unto my daughter Christina, that married John Kiser, a negro girl by the name of Mariah and her increase, and the plantation on which *they* now live, by said John Kiser giving my beloved wife twenty bushels of corn and one good four horse load of hay per annum, as long as she lives, and at the death of both of them, said negro girl and her increase, to fall to the heirs of my daughter Christina."

Christina is dead, leaving two children, who are the plaintiffs and her husband, who is the defendant: The question is, are the children entitled, as purchasers, under the limitation over? Or did the title to the negro woman vest absolutely in Christina, so as to pass to her husband?

It is settled that the "rule in Shelly's case" applies to personal property, and we can see nothing to take this case out of its operation; Christina took at least a life estate, and by the same gift a limitation is made to "her heirs," consequently, they are words of limitation and not of purchase. An examination of the whole will shows nothing to justify the construction that "heirs" is used in the sense of "children": If such was the testator's intention, it is to be regretted that he did not use words proper to express his meaning, instead of using words that have a settled legal signification to the contrary.

Our attention was directed to the fact that the limitation over, was "at the death of *both of them*," and it is suggested to be doubtful who was meant. It is evident that Christina was one of the persons meant, because the first estate is given to her, and the limitation over it is to *her heirs:* Whether her husband or her mother was the other person meant, can make no difference; it only shows that the estate given to her was not only for her own life, but for the life of another also.—It is settled that the intervention of a life estate to a third person, does not prevent the application of the rule; of course, giving the first taker a greater estate than for his own life cannot have that effect.

Our attention was also directed to the fact, that in regard to the "plantation," no limitation over is made; so, Christina took that absolutely, and it is suggested that the limitation

over, in regard to the negro, shows that the intention as to her, was different, and that the testator did not intend to give her also absolutely to his daughter. This may be so; but it does not show that the testator used the word "heirs" in the sense of children, which is necessary, in order to prevent the application of the rule.

When applied to real estate, the word "heirs" means those who take according to the rules of descent, and if a gift be made so as to pass the same estate *to the same persons as would pass by descent*, the rule applies, and they are held to take by descent notwithstanding an expressed intention, that they should take as purchasers.

Upon the same principle, if one in England devises to his eldest son, the same estate that he would take by descent, he is *held* to take as *heir* and not as *devisee*. Both rules being founded, not upon the question of intent, but upon the policy of preventing fraud.

"The word "heirs" is not appropriate in the disposition of personal property, and when used, in reference to it, means those who take by law or under the statute of distributions; this is the rule when there are no other words to give it a different meaning." *Corbett* v. *Corbett*, ante 117, 2 Wm's on Ex'rs, 725.

So, if the testator meant by making the limitation over, and using the word "heirs," to give the same estate to the same persons, that they would have taken if the absolute estate had been given to the taker of the first estate, the rule applies.—In order to prevent its application, words must be used, showing an intention to pass a different estate from that which would pass by law, or to give it to different persons from those who would take by law: as would have been the case if he had used the word "children" instead of "heirs," or used some other words showing that by "*heirs*" he meant "*children*."

The soundness of the rule, in regard to real estate, has never been questioned. If one, in acquiring land, was permitted to take an estate to himself for life, and have the remainder limited over to his heirs, so as to give them the same estate by

purchase, that they would have taken by descent, had the ancestor taken a fee instead of a life estate, the door to fraud would be left wide open: widows would be defrauded of dower, creditors of their debts, &c.

The propriety of the application of the rule to personal estate was for some time questioned, but it has been long settled, and is now an established rule of property which cannot be departed from. Bill dismissed.

PER CURIAM.. Decree accordingly.

MILTON H. STREATER *against* BANK OF CAPE FEAR.

Equity does not create law, but follows it. Where, therefore, a bank note, payable on demand at a particular place, has been lost or destroyed, no remedy will be afforded the owner in a Court of Equity, before a demand has been made for payment at the place designated.

CAUSE removed from the Court of Equity of New Hanover, at the Fall Term, 1854.

No counsel appeared for plaintiff.

W. A. Wright for the defendant.

NASH, C. J. There is no dispute between the parties as to the facts of the case: The defendants issued a note or bank bill for one hundred dollars payable to the bearer at the branch of the said bank at Salisbury. The note in the present case, had been cut into halves, one of which was lost, and the other half presented at the counter of the mother bank at Wilmington for payment, which was refused: no demand was made on the branch at Salisbury. The bill is filed against the mother bank at Wilmington; it cannot be maintained.

At law, it is fully established that a promissory note, made payable on its face, on demand at a particular place, must be presented at that place before any cause of action arises to the holder. The place stands in the body of the instrument as a part of it, and an important part of the contract. It must be declared on as it appears, and so proved. When no place is

specified where a note is to be paid, the debtor must seek his creditor; by specifying the place, the debtor is saved this trouble, as he knows where to go to meet his note at maturity. Until a demand at the place designated, the debtor is in no default, and the holder has no cause of action. *Bank of the State* v. *the Bank of Cape Fear*, 13 Ire. 75, and the cases there cited. This, then, is the law. Has a Court of Equity any power to dispense with this law? It is a maxim in Equity, that it follows the law, but it nowhere assumes to create law. Mr. Adams, whose treatise on Equity is a mine of wealth to the student, and the dispenser of equitable rights, at the 30th page of the introduction to the work says, the principal upon which the power of a Court of Equity is exercised, is that of affording an effectual remedy, where the remedy at common law is imperfect, but not, as has been sometimes erroneously supposed, that of creating a right which the common law denied; and at page 42, he says, "Equity does not create rights which the common law denies." The common law denies to the holder of a promissory note any right of action, until a demand is made at the place specified on its face—the parties have made it a part of their contract. Nor does this case present the principle where Equity modifies the rules of the law, for *it* applies to cases seeking a specific performance of a contract. The case of *Allen* v. *State Bank*, 1 Dev. and Bat. Eq. 3, merely establishes the principle that where a bank note is lost, or where it has been cut into two halves, and one half lost, that the latter is not a destruction of the note, and that Equity will grant relief, upon the proper indemnity; it says nothing about presentment, when specified.

In this case, the note being on demand, distinguishes it from *Nichols* v. *Pool*, decided at this Term, 2 Jones' R. 4; there the time of payment was certain; in this it is uncertain. Bill dismissed with costs.

Per Curiam. Decree accordingly.

JAMES E. NELSON *against* ISAAC HUGHES.

The act of 1812, subjecting trust estates to sale under an execution, does not embrace mere equitable "rights," but is confined to equitable "estates"; it was, therefore, *held*, 1st that the *right* to have it declared in a Court of Equity, that one has made an election to give up his own property, or is bound to do so or to forfeit a legacy, and to ask for a decree converting him into a trustee, is not the subject of a sale under an execution.

2nd. That a right to ask for a decree converting A into a trustee for B, on the ground that the purchase was made with B's money, and for his use, is not the subject of a sale under an execution.

3rd. A trust liable to be sold by execution under the act of 1812, by the sale, is converted into the legal estate, and the right to it must be asserted in a Court of Law, and not in Equity.

APPEAL from a decree of the Court of Equity of Beaufort County, at the Fall Term, 1854, sustaining the demurrer to the plaintiff's bill, his Honor, Judge CALDWELL, presiding.

The plaintiff, in his bill alleges that in 1824, William S. Blackledge, by deed reciting a consideration of three hundred dollars, paid to him by Charles Carter, conveyed to Joseph, William, James and Robert Carter, in fee simple, the property in question, viz: a lot in the Town of Washington: that these grantees were infant children of Charles Carter, and that they had no property whatever: that the consideration recited, was not in fact paid by Charles Carter, who was entirely insolvent, but was paid by Sarah Carter, a sister of the said Charles, who permitted him and his family to reside on the lot in question for four or five years after the purchase: that the lot then remained unoccupied for several years, until possession was taken of it by the defendant: that shortly after the deed was made, Robert and James Carter died under age without issue, leaving Joseph and William their heirs at law.

Plaintiff further alleges that Sarah Carter died about the year 1836, having made and published her last will and testament whereby "she gave all her property except the said lot and a bedstead to her mother for life, and after her death, to the said Joseph Carter, subject to a charge of $100, and to William Carter the lot in question: that Joseph Carter was appointed

executor in the said will, who proved the same, and immediately proceeded to possess himself of the personal estate, and out of it, to pay the debts and legacies of his testator: that the mother of the testator died shortly after the said Sarah, and that said Joseph under, and by virtue of the said will, took possession of the real and personal estate given to him upon that event, and that the value thereof greatly exceeded the value of half the lot in question, and even greater than the value of the whole: that William Carter also took possession of the lot under and by virtue of the will, with the knowledge of Joseph, and without objection from him: that Joseph never set up any claim or title to this lot, but preferred and elected to take the greater interest given him by the will.

The bill further alleges that the plaintiff bought the interest of William Carter at Sheriff's sale, and had the same conveyed to him by a Sheriff's deed bearing date in 1845: that Joseph Carter died intestate, and that there being no assets in the hands of the administrator, a *scire facias* issued against the heirs at law, upon which a judgment was obtained, and a *fi. fa.* having issued thereon, it was levied on this town lot, and the interest of Joseph Carter was sold and conveyed by the Sheriff to the defendant Hughes, who took possession thereof, claiming the whole estate in the same. The bill further charges that Hughes had notice of the premises.

It was insisted by the plaintiff, on this state of the facts, 1st: That the said Sarah, having paid the purchase money for the said lot, the grantees in the deed from Blackledge held the same in trust for her, and she could therefore dispose of the same by will.

2nd. That if the said Sarah did not pay the purchase money, but the same was in fact paid by the infant grantees, or by any one as an advance for them, then, that the said Joseph and William were, at the death of the said Sarah, seized thereof in undivided moieties as tenants in common; and that the said Joseph was bound to elect between the legacy to him in the will of the said Sarah and his estate in the said lot, and that he did so elect, and that thereby William became seized, in fee, of an equitable estate in the moiety of said Joseph,

and that by the Sheriff's sale and deed, the plaintiff became entitled to that estate.

The prayer of the bill is, that the plaintiffs title may be declared, and that the defendant be decreed to convey his legal estate in a moiety of said lot to him, and put him in possession thereof, and for general relief.

The defendant demurred to the bill, and the cause set for argument on the demurrer; and upon the argument it was adjudged that the demurer be sustained, and the bill be dismissed. From which judgment, the plaintiff prayed and obtained an appeal to the Supreme Court.

Rodman for the plaintiff.
Donnell for the defendant.

Pearson, J. The legal estate to the lot in controversy, was vested in William and Joseph Carter, as tenants in common. In any point of view, William had the equitable estate in one half, consequently, as to that half, having both the legal and beneficial estate, he had a full title, which passed to the plaintiff as purchaser at sheriff's sale, and his remedy at law, if he is ousted from the whole, is clear. This half, then, may be put out of the case. But the plaintiff alledges, that William was also entitled to the equitable estate in the other half, and that it passed to him by the sheriff's sale, and the object of the bill is to get a conveyance of the legal estate.

The equity is put on two grounds: *First*, that as Sarah Carter paid the purchase money, although the legal title was vested in Joseph Carter, yet, he held in trust for her, and the equitable interest passed to William by her will. Suppose this to be so, the question is, did William have such an equitable interest in this half, as was liable to be sold under execution? This question will be disposed of in connection with the other. *Second*, if Sarah Carter did not pay the purchase money, or if she intended it as a gift to her nephew, then the entire estate vested in William and Joseph as tenants in common; but as the lot is devised by Sarah Carter to William, and other property of much greater value is given by her to Joseph, William had a right in Equity, to put Joseph to his

election, and to have it declared that Joseph had elected, or should be decreed to elect, and in case he took under the will, that he should be decreed to convey the half of the lot to which he was before entitled, to William. Suppose this to be so, the question is, did William have such an equitable interest in this half, as was liable to be sold under execution? As the case comes up on demurrer, if the plaintiff has an equity, in either aspect, the demurrer must be overruled. So it is necessary to dispose of both questions, and it is convenient to discuss them together. In *Thompson* v. *Thompson*, I Jones' Rep. 432, after showing that there is the same difference between an "estate" and a "right" in Equity as at Law, the opinion proceeds: "No question is made as to the distinction between an "estate" and a "right" in equity. The grounds of the distinction consists in the difference between a trust, created by the act of the parties, where he who has the legal estate, consents to hold it in trust for the other, and there is no adverse possession or conflict of claims; and a trust created by the act of a Court of Equity, where there is a conflict of claims, and the party having the legal estate holds adversely, and does not become a trustee until he is converted into one, by a decree founded on fraud or the like. In the former, the *cestui qui trust* has an estate; in the latter, a mere right."

By the act of 1812, Rev. Stat. ch. 45, sec. 4, a trust is made liable to sale under an execution, in the same way as if the *cestui qui trust* had the legal estate; the purchaser acquires the legal estate, and the property is to be "held and enjoyed, *freed* and *discharged* from all incumbrances of the person *so seized* or *possessed in trust*, for the person against whom such execution shall be sued."

In putting a construction upon the statute, two considerations present themselves. The object was to put property, held in trust for a debtor, upon the same footing, in reference to its liability to be sold under an execution, as if the debtor owned the property itself. There is no reason to suppose that it was the intention of the law-makers, to extend the reach of an execution, in reference to property held in trust beyond that which it had at common law. "A right" to proper-

ty, is not subject to execution at common law; the debtor must have an "estate"; consequently "a right" to have one declared a trustee, is not subject to execution, under the statute; the debtor must have a subsisting trust—an "estate" as distinguished from a mere "right in Equity."

Second. The statute enacts, that the purchaser shall have the legal estate, and shall hold the property free from all incumbrances of the trustee. If the trust be one created by the act of the parties, where he who has the legal estate, has consented to hold it in trust for the other, this is all well enough. But if the party who has the legal title, holds adversely, sets up a conflicting claim, and denies that he is a trustee, it would be downright injustice to take the legal estate from him, and vest it in the purchaser at execution sale, to be "held and enjoyed free and discharged from all incumbrances," without giving any opportunity to contest the alleged right of the debtor, and before any trust has been declared to exist in his favor.

But the concluding lines of the section relieves it from this charge of injustice, "freed from all incumbrances of the person *so seized* or *possessed in trust for the person against whom such execution shall be sued.*" Thus taking it for granted that there is an existing trust—an estate, not a mere right.

By way of illustration, take the cases supposed in *Thompson* v. *Thompson*; a trustee sells land in violation of the trust, the purchaser alleges that he bought for valuable consideration without notice, but a creditor of the *cestui qui trust* has the land sold under an execution; if this right of the debtor, is liable to execution under the statute, the purchaser at sheriff's sale, deprives the purchaser from the trustee, of the land, before it has been declared whether he purchased with or without notice; in other words before he has been converted into a trustee. So, if a trustee buys land, and it is alleged that he used the trust money to pay for it, a creditor of the *cestui qui trust*, can have the land sold at execution sale, before it is ascertained whether the trustee misapplied the trust money or not, and the purchaser at sheriff's sale takes the land free of all incumbrances! It is clear a "right in Equity" is not liable to execution.

There are even exceptions to the general rule, that an existing trust, or "estate in equity" is liable to execution. A vendee who has paid part of the purchase money, is considered in Equity as having the estate, yet this trust cannot be sold because of the manifest injustice of taking the legal estate from the vendor, and passing it to the purchaser. So, one having an equity of redemption is considered in Equity as the owner of the estate, but this trust could not be sold under the 4th section, and it was necessary to pass the 5th section which makes it liable to execution, and the 6th section which directs the sheriff in his deed to set forth, that the land was under mortgage, so as to leave the right of the morgagee, unaffected by the sale.

It remains to be seen whether William Carter, under either aspect of the case made by the bill, had an existing trust or estate in Equity. Manifestly a right to have it declared by a Court of Equity, that one has made an election to give up his own property, or is bound to make an election either to do so or not to take benefit under a will, and to ask for a decree converting him into a trustee, and requiring him to make a conveyance, is not an estate in Equity. This disposes of one aspect of the case. It seems equally clear, that in the absence of any declaration of trust in the deed, a *right* to have it declared by a Court of Equity, that a tract of land which has been conveyed to A, was purchased and paid for by B, for his own benefit, and to ask for a decree converting A into a trustee, and requiring him to convey to B, is not *an estate in Equity.*

To apply this to our case: In reference to the half of the lot now under consideration, the plaintiff alleges that Sarah Carter bought the lot and paid for it with her own money, and for her own use, and devised it to William Carter. The deed is made to Joseph Carter, and sets out no trust for Sarah Carter, but recites that the purchase money was paid by *Charles* Carter. Whether Sarah Carter paid the money is an open question; if she did so, whether it was not by way of loan to Joseph or Charles Carter, is an open question; and if she did not lend it to either, whether she did not intend, by having

the deed made to Joseph, who was her nephew, to make a gift to him, is also an open question. And yet, without having these facts declared, the plaintiff insists on the right to prejudge the matter; have the lot sold under an execution against William, divest the legal title of Joseph, and pass it to the purchaser free from all encumbrances. To allow this, would bring reproach upon the administration of justice in any country. But it is asked, how are creditors to subject these "rights" of debtors to the payment of their debts? The reply is, as was said in *Page* v. *Goodman*, 8 Ire. Eq. 16. *Thigpen* v. *Pitt*, ante 49, and many other cases. The creditors may have relief by filing a bill in Equity, to have the interest of their debtors declared, and sold under a decree. This is the proper course to take in regard to the alledged rights of William Carter.

There is another view which presents a fatal objection to the bill. If William Carter had such a trust as was liable to be sold under execution, then the plaintiff, being a purchaser at sheriff's sale, acquired the legal title, and has a clear remedy at Law, and there is nothing to ask a Court of Equity for. So, take it either way, the plaintiff, as a *purchaser at sheriff's sale*, has no footing in a Court of Equity. *Thigpen* v. *Pitt*, cited above. Bill dismissed.

PER CURIAM. Decree accordingly.

JAMES M. MORGAN AND WIFE *against* DURANT TILLET AND OTHERS.

There is no remedy in Equity against the heirs at law of one, who has violated his parol agreement to devise to the complainant the land descended.

CAUSE transferred from the Court of Equity of Camden County.

Joseph Seymour, the first husband of the plaintiff, Mrs. Morgan, devised to her the tract of land in question. After his death, she was married to Isaac Tillet, the father of the defendants, and upon his death she was again married to the plaintiff, James M. Morgan. While the wife of Tillet, she

joined with him in a deed for this land to one Enoch P. Dailey, and was privily examined touching her willingness to execute the same; upon which occasion, she declared her entire willingness to do the act, and then again assented to it. Dailey immediately conveyed the premises to the husband. The consideration expressed in both these deeds is $2000, but no money was paid, and the real object was to transfer the land to the husband: the point of controversy between the parties is as to the terms upon which this transfer was made.

The plaintiffs in their bill say that there was a parol agreement between the husband Tillet and his wife, that she was to have the land in fee simple in case she was the longest liver: that he was to put the improvements on it which he did, and as a consideration for so doing, was to have the land, in case he survived her, and that such agreement was to be put in writing immediately after the marriage: That after the marriage, her husband assured her that he would fulfil the contract between them by making a will in her favor for the land which she ignorantly supposed was a proper, if not the only way to carry into effect their understanding, but that he had failed to make any will, and the land had descended to his heirs at law, the defendants.

The answer denies that any such agreement was made, and insists that if any such was made, that the statute was a bar to their suit, and upon this they rely, as if the same had been alleged by way of a plea.

There was replication to the answers: commissions and proofs, and the cause being set for hearing, was sent to this Court.

Smith for Plaintiff.
Heath for defendant.

Pearson, J. Whether the parol agreement to reconvey the land, so that it should vest in Mrs. Tillet, (now Mrs. Morgan,) if she should survive her husband (Tillet) which is alleged in the bill, could be decreed to be specifically performed, if it had been fully proved or admitted, notwithstanding the statute of frauds, is a question that we are not at liberty to decide.

The agreement alleged is not proven. We are inclined to

think, from the proof, that Tillet was not willing to make the expensive repairs and improvements, that his wife desired to be made upon the land, and that were necessary in order to make it an elegant and comfortable residence, unless the title was vested in him, and that Mrs. Tillet consented to pass the title to him in consideration of his making the repairs and improvements, with an understanding, that he was to make a will devising the property to her in the event of her being the longest liver. Tillet, it would seem, violated his promise and neglected to make a will. There is no power in this Court to make one for him, or to require his heirs to do by *deed*, what he had promised to do by will: because, the very essence of a will is that it is "*ambulatory*": a will made to-day may be revoked *to-morrow:* for this reason, the idea of decreeing a specific performance of an agreement to make a will is not to be met with in any of the books; and the plaintiff's vainly endeavor to avoid the question by alleging that Tillet had agreed to convey. Whereas the proof is, he had agreed to make his will and give the land to his wife if she should survive him.

PER CURIAM. Bill dismissed.

JOSEPH H. SKINNER AND ANOTHER *against* JOSEPH H. WYNNE AND H. G. SPRUILL, ADM'R.

Where the two daughters of an intestate die in the life-time of their father, the one leaving two children and the other one, distribution must be made of his estate among these grand children *per capita.*

Grand children taking, in their own right, are not chargeable with advancements made to their deceased parents.

APPEAL from the Court of Equity of Tyrrel County.

Joseph Halsey died in the year , leaving two grand children, Joseph Halsey Skinner and Sarah Halsey Skinner, infant children of his deceased daughter Anne, and another grand child, Joseph Halsey Wynne, infant child of his deceased daughter Sarah.

Both the daughters of Mr. Halsey, died in the life time of their father, leaving husbands surviving them, but he had no other children, nor any descendants of such besides the three grand children mentioned above.

Mr. Halsey, during the life of his daughter, Mrs. Skinner, put into her husbands possession several slaves without any written conveyance, which the husband sold and made use of the money, without rendering an account therefor.

He also, without writing, put into the possession of Mr. and Mrs. Wynne, one negro slave which he sold and made use of the money, without accounting for the same.

The bill is filed by the two children of Mrs. Skinner against the administrator of their grand father, and against the other grand child of J. H. Wynne, praying an account and distribution of the estate. The bill alleges that there were no debts but those which have been paid off, and there is no reason for the administrator's keeping the property in his hands any longer. It prays that distribution be made *per capita*.

The answer of the administrator admits the facts above set forth, but says that two years have not yet elapsed since he administered, and that he ought not to be decreed to account before the end of that period. As to the mode of distribution, and the other questions arising out of the estate, he submits them to the Court.

The defendant, Joseph H. Wynne, answers by his guardian, Mr. Simmons, and commends his interests and rights to the protection of the Court. The cause was set for hearing on the bill and answers, and his Honor decreed that distribution be made *per capita*, and that an account be taken by the master. From which decree the defendant, J. H. Wynne, appealed to the Supreme Court.

Upon the argument in this Court, two points were made for the defendant, Wynne: first, that in right of his mother, he was entitled to one half of the personal estate of his grandfather.

2nd. That the advancements to their fathers, should be accounted for in the distribution, and a proportionate deduction made.

Gilliam for plaintiff.
Heath, for defendant.

Nash, C. J. Joseph Halsey died in the year ——, intestate,

and administration on his estate was granted to H. G. Spruill, one of the defendants. The intestate left three grand children, Joseph Halsey Skinner and Sarah Skinner, whose mother, a daughter of the intestate, died before him, and Joseph Halsey Wynne, whose mother also died before the intestate. The two first grand children are plaintiffs, and the third is a defendant. The bill is filed to settle the estate of Joseph Halsey, and prays an account and partition of certain slaves.

Two years had not elapsed from the qualification of the defendant, Spruill, as administrator of Joseph Halsey, to the filing of the bill. It was conceded that the estate was settled, so far as the debts were concerned. Two years are allowed executors and administrators to settle the estate of the deceased, upon the supposition that many estates cannot be settled in less time, but this is intended as an indulgence to them.—*Turnage* v. *Turnage*, 7 Ir. Eq. 127, and when there are no debts to pay, it is the duty of the representative to pay the legacies or distribute the estate without waiting for the expiration of the two years. The principal question is as to the right of the grand children of the intestate, in the division of the property to which they succeed. Do they take *per capita* or *per stirpes?* The exact case is put by Justice Blackstone in the 2nd vol. of his commentaries, page 517. "If the next of kin of the intestate be three brothers, A, B, and C, his effects are divided into three equal portions, and distributed *per capita*, one to each, but if one of these brothers A, had been dead, leaving three children and another, B, leaving two, then the distribution must have been *per stirpes*, namely, one third to A's three children; another third to B's two children, and the remaining third to C, the surviving brother. Yet, if C had been also dead without issue, then A's and B's children being all in equal degree to the intestate, would take in their own rights *per capita*, to wit: each of them one fifth part." The negroes in controversy are to be divided into three parts, and each of the infant grand children, is entitled to one part, taking *per capita*. Taking *per capita*, in their *own right*, they do not account for the advancements made to their respective parents. There must be a reference to the master to take an account of

the estate of Joseph Halsey, in the hands of his administrator, and also to divide the slaves named in the bill between the three grand children of Joseph Halsey, and the case is retained for further directions.

PER CURIAM. Decree accordingly.

RICHARD P. FREEMAN AND OTHERS *against* WILLIAM MEBANE AND OTHERS.

A as principal and B as his surety, executed a bond to C, with a condition to make a title to land on the payment of the purchase money: before the purchase money was all paid, the land was sold at sheriff's sale to satisfy executions against A who became insolvent: C sued B. for the remainder of the purchase money, and recovered it. *Held* that B had a right to follow the land and have remuneration out of it in the hands of the purchaser at sheriff's sale for the money he had thus paid.

CAUSE removed from the Court of Equity of Bertie County, at the Fall Term, 1854.

The bill alleged that one John A. Sutton contracted to sell to Harry Nichols a certain hotel and the appurtenances in the Town of Windsor, at the price of eight thousand dollars, for which Nichols executed to Sutton three bonds for the sum of $2666⅔ dated 1st January 1841, payable one, two and three years after date, and bearing interest from date: that a part of the contract was, that Sutton should retain the legal title until the payment of the bonds. At the same time, and as a part of this contract, Sutton executed to Nichols a penal bond in the sum of $10,000, with the plaintiff, Richard P. Freeman, as surety, conditioned to be void if the said Sutton should make to Nichols a good title in fee simple for the property in question as soon as Nichols should pay the purchase money in full: and that Nichols immediately went into possession of the purchased property. That at the time of this bargain, Sutton was a man of large property.

It further alleged, that Nichols paid towards these bonds,

during the next month (February) $6000, and some time during the same year $900 more.

That in 1842, Sutton became much embarrassed with debt, and his entire estate was sold under executions: that in 1843, the property in question was levied on and sold at sheriff's, sale to satisfy executions against Sutton, and that the same was purchased by Alexander W. Mebane, who took a deed from the sheriff for the same, and that at the time of the purchase Mebane had full knowledge of the premises: that from the fact of this incumbrance, and from the great scarcity of money, then existing, the property sold for $1301, which was only about one fourth its value, and that Mebane bought with the expectation of being liable to the claim of Nichols:

That Mebane instituted an action of ejectment in 1845, and having recovered, ousted Nichols and took possession, which has ever since been retained by him and those claiming under him:

That Mebane died in 1846, having devised the hotel and appurtenances in question to the infant defendants, his children; and having appointed the other defendant, Moring and J. H. Mebane, his executors, who qualified:

That Sutton continued insolvent until the year 1844, when he died intestate, (still insolvent) and one John L. Webb became his administrator, *de bonis non.*

That Nichols, in 1848, brought suit on the penal bond given by Sutton with p aintiff, Freeman, as *surety*, which having abated as to the administrator, Webb, by his death, judgment was rendered against Freeman alone for the sum of $207 80 cents with interests and costs, which has been paid by him: that it is impossible to get any thing by the way of remunertion from the estate of Sutton.

It is further alleged in plaintiff's bill, that the rule of damage adopted by the Supreme Court, (to which the case of Nichols against Freeman, was carried by appeal) was the difference between the value of the property when sold by the sheriff, and the amount then due to Sutton by Nichols, which was ascertained to be the sum of $207 80 cents, as above stated.

The bill alleges that the plaintiff has demanded the amount paid by him from the defendants, and that they have refused payment.

The plaintiff states that Freeman had conveyed his interest in this claim by a deed of trust, and that the trustee having died, his heirs at law, who are infants, are made parties to represent him in this suit.

The prayer is, that Freeman, to the use of the representatives of the trustee, may be substituted to the rights of Nichols, and that he may be reimbursed for the amount paid by him, and for general relief.

Richard P. Freeman, Harry Nichols, Gilliam, adm'r *de bonis non*, of Sutton, and the infant heirs of Allen, the trustee, by their next friend, are the plaintiffs, and the devisees and executors of A. W. Mebane, are the defendants.

The defendants demurred to the bill, and the cause being set for argument on the demurrer, was sent to this Court by consent.

Winston, Jr., for the plaintiffs.

No counsel appeared in this Court for the defendants.

Pearson, J. By this purchase, at sheriff's sale, Mebane acquired the legal estate which was in Sutton, but he purchased with notice: indeed, notice was not material, for a purchaser at sheriff's sale, with or without notice, only acquires the estate which the debtor could rightfully pass: so he put himself "in the shoes" of Sutton, and took the legal estate subject to all the equities to which it was liable, in his hands.

In *Nichols* v. *Freeman*, 11 Ire. Rep. 99, it is said "Nichols had the right to file a bill in Equity for a specific performance, and the decree would have been for the conveyance of the property upon his paying the balance of the purchase money with interest." He did not choose to resort to Equity, and brought an action at law against Freeman, who was the surety of Sutton, with the expectation, no doubt, of being able to recover from him all that he had paid Sutton towards the price of the land. In that case, it was decided that he had a right to recover the difference between the value of the property at the

date of the sheriff's sale, and the balance of the purchase money which then remained unpaid. Freeman has paid the amount recovered, and the question is, has he an equity to call upon the defendants, who are the representatives of Mebane, and are in the enjoyment of the property, for exoneration?

There is no question of the equity as against Sutton, but he is dead and insolvent, and the object of the bill is to follow the property in the hands of the representatives of Mebane. Of this equity, we think there can be as little doubt.

Sutton held the legal estate in trust for himself, to secure the balance of the purchase money, and then in trust for Nichols. After the purchase by Mebane, Nichols had two remedies:—to pay the balance of the purchase money to Sutton, and call upon Mebane for the legal title, *Ratledge* v. *Smith*, Bus. Eq. 283, or to sue at law on the bond: He elected to sue Freeman, who was the surety, and upon the payment of the amount recovered, Freeman had a clear equity, as surety, to be substituted to the rights of the creditor, and to have the benefit of all the securities to which the creditor might have resorted. This is a well settled principle in Equity, and is applicable to our case, and gives Freeman a right to hold the property in the hands of the representatives of Mebane, bound for his exoneration.

If, as is contended for by the defendants, Mebane, by his purchase at sheriff's sale, acquired not only the legal title, but also the equitable interest of Sutton, that is, his lien for the balance of the purchase money, Freeman's equity is manifest on two grounds: If a surety pays for the property he has a right to hold it bound for his exoneration. *Green* v. *Crockett*, 2 Dev. and Bat. 390; *Polk* v. *Gallant*, ibid 395; *Smith* v. *Smith*, 5 Ire. Eq. 34; *Egerton* v. *Ally*, 6 Ire. Eq. 188. Freeman as the surety of Sutton, under whom Mebane claimed, has been forced to pay, in part, for the property which the representatives of Mebane now enjoy.

Secondly. If Nichols had filed a bill for a specific performance, Mebane would have been forced to convey the property to him, upon his paying to *Sutton*, the balance of the purchase money: and Mebane could have set up no greater equity than

to be repaid, out of the fund, the amount which he had paid to the sheriff: whether he would have had this equity, need not now be enquired of: it is certain his equity would have extended no further: He, therefore, by taking the place of Sutton, was obliged to rely on Freeman for protection against the loss of the property, and substituted himself as *principal* in regard to it: Freeman was not be benefitted: the gain, if any, was to be Mebane's, and by thus having an innocent man between him and danger, he, in Equity, adopted him as his surety, and can not, with a good conscience, take advantage of the accident, that Nichols elected to proceed at law, and throw the loss upon his protector. Freeman's equity cannot be made clearer than by a mere statement of the facts.

The demurrer is to the whole bill, and being bad as to part, must of course be overruled as to all.

It is unnecessary now to decide whether the representatives of Sutton have an equity to call for a conveyance of the property either absolutely, or subject to Mebane's right to hold it as a security for the repayment of the amount paid by him to the sheriff.

The alleged equity is based on the ground that at the time of the sheriff's sale, Sutton held the legal title in trust to secure the payment of the balance of the purchase money, and then in trust for Nichols; that although the naked legal title was subject to execution sale, yet the equitable interest of Sutton was not: so the purchaser acquired only the legal, and did not acquire the right to recover from Nichols the balance of the purchase money: that right, as is contended, still remained in Sutton, and as the equity of Nichols has been extinguished by his election to proceed at law, the representatives of Mebane hold the legal title in trust to exonerate Freeman as surety for what he has paid in order to extinguish the equity of Nichols, and then in trust for the representatives of Sutton, whose equitable interest never passed to Mebane.

This is an interesting question, and we prefer to leave it open for future investigation. We call attention to it now on-

ly with the view that it may be fully discussed if it should be again presented to us.

PER CURIAM. Demurrer overruled

JOHN D. LOVE *against* GODWIN E. BOWEN AND WM. B. JONES.

A bill in the nature of an attachment, to subject a claim due to an absconding debtor from a third person, to the payment of a judgment against such debtor, will not be sustained where such debtor has only been made a party by advertisement and not by actual service on the person: because the decree asked for, would not protect his debtor out of this State.

CAUSE transmitted to this Court from the Court of Equity of New Hanover.

The plaintiff had recovered a judgment for the sum of $316 and costs in the County Court, and took out execution, which was in part satisfied, and returned *nulla bona* as to the remainder. The defendant, Bowen, having been surrendered by his bail, was confined in prison, and afterwards regularly discharged under the insolvent law. The bill alleges that the defendant, Bowen, has no property wherewith to satisfy his judgment, but that the defendant, Wm. B. Jones, owes him a promissory note of about $400, due on 1st of January, 1849, the prayer of the bill is to subject this debt to the payment of the plaintiff's judgment.

The defendant, Jones, only was served with a subpœna, but advertisement was formally made for the defendant, Bowen, who had left the State, to come in and plead, and a judgment *pro confesso* was entered as to him. Jones admitted his indebtedness to Bowen, but contended that he would not be protected by a decree of this Court beyond the limits of the State, and would thus be subjected to the risk of paying the note a second time.

The cause was set for hearing on the bill, answer and exhibit, and sent to this Court.

W. A. Wright for the plaintiff.

D. Reid for the defendants.

NASH, C. J. There is no controversy as to the facts of this case: the bill was drafted doubtless on the authority of *Brown*

v. *Long*, 2 Dev. and Bat. Eq. 138: between that case and this, however, there is a substantial difference. All the parties were there, before the Court by personal service. Here, only Jones has been served with a subpœna. The other defendant Bowen, the principal, having left the State, is a party only by notice under the act of Assembly. In Long's case, the decree was placed on the ground that the defendant was a debtor discharged under the insolvent law, and the property, sought to be subjected, was acquired after his discharge.—That case was rightly decided. The subsequent case of *Yarbrouyh* v. *Arrington*, 5 Ire, Eq. 291, is decisive of this. The bill was dismissed because no decree, that could be made, would effectually protect the defendant in making the payment to the plaintiff, which it would require of him. The bill alleged that Thomas Yarbrough owed a debt to the plaintiff which had been reduced to a judgment, and that he had, in this State, no property out of which the debt could be raised, but the distributive share of his wife in the estate of her father, and prayed a decree for satisfaction out of that share. Thomas Yarbrough and wife, were living in Arkansas, and they were made parties by advertisement, and the bill taken *pro confesso* as to them: A subpœna was served on Nicholas Arrington, the adm'r of Frederick Battle, the father of Mrs. Yarbrough. The Court say, as Yarbrough and wife have not been served with process, nor appeared in the cause, the decree would have no binding extra-territorial effect, and the Courts of Arkansas would not enforce it; and if the plaintiff could not enforce it abroad against Yarbrough and wife, because they were not parties to it by personal service or by appearance, it is clear that for the same reason, it could not be set up as a defence by Arrington to a demand by Yarbrough and wife for her ditributive share: and the Court use this emphatic language, "The consequence would be that Arrington could not put his foot out of North Carolina without exposing himself to a suit for the distributive share, and would have to pay it again."

In our case, the defendant, Bowen, had left the State before the filing of the bill, and no process has been served on him,

nor has he appeared in the suit: if a decree should be made against the defendant Jones for the amount he may still owe to Bowen, the latter not being a party to the proceedings, would not be bound by them, and of course they would afford no no protection to Jones, if sued abroad by Bowen for the amount due. The Court, in Arrington's case, further say that under the attachment law, a debtor might be subjected to the payment of the debt twice; but there is no statute in this State authorizing an attachment in Equity, which in substance, the bill in that case was: and the bill in this case, is so likewise. The Court cannot make the decree asked for, but must dismiss the bill with costs.

Per Curiam. Decree accordingly.

ALVANY *against* J. J. W. POWELL AND OTHERS.

One domiciled in Canada dies intestate and without issue, leaving property in this State, the brother of the intestate receives the property from the administrator appointed here, *Held* that such distributee is liable to the tax imposed by our statute.

This case was before the Court at the December Term, 1853, ante 35 , and a decree made for an account. On the coming in of the Commissioner's Report, an exception was filed to a charge of a tax upon the estates of John and Florence, under the revenue laws of this State. The exceptions set for argument, and argued at June Term, by Mr. *Moore*, for the plaintiffs, and *H. C. Jones* for the defendants.

The Court took an *advisari*, and now the opinion of the Court is delivered by

Pearson, J. One domiciled in Canada dies intestate and without issue, leaving property in this State; the brother of the intestate receives the property from the administrator appointed here; is he liable for the tax imposed by our statute?

The act provides, sec. 1st, "A tax of one per centum shall be levied and collected upon the value of all real estate descended or devised to collateral kin. Sec 2nd, A tax of one per cent shall be levied and collected upon the value of all personal

property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to, or amongst the next of kin, of any intestate when such next of kin, are collateral relations of such intestate." I will venture the assumption, that the first impression made, by these words, upon any one is, that it was the intention of the Legislature to impose a tax on all real and personal estate, *situate in this State*, which, upon the death of the ower, passes to strangers or collateral kindred! The object of taxation is to support the government by which laws are made for the protection of persons and property. Of course, the persons and property protected, ought to pay the expenses of the government. It is seen at once, that the persons who live in this State and the persons and property, protected by our laws, are consequently, the legitimate subjects of taxation.

The impression, that it was the intention of the Legislature to impose a tax upon all real and personal estate, *situate in this State*, which upon the death of the owner passes to strangers or collateral kindred, is aided by the consideration that, in regard to property situate here, we have the means of enforcing the payment of the tax, whereas, property situate out of the State, is beyond our reach; and there is this further consideration: if the property of one of our own citizens, which is situate here, and passes to strangers or his collateral kindred, is subject to a tax because of the protection it receives under our laws, why should not the property of one who has his domicil abroad, but whose property is situate here, is protected here and is administered here, and passes by force of our laws, be subjected to a like tax?

When the question was first opened, these views made so strong an impression upon my mind in favor of construing the statute so as to include all property situate in this State, that, I confess, I imagined little could be said in favor of any other construction; but the very elaborate argument of Mr. *Moore*, showed that much could be said on the other side; that the Courts in England, after half a dozen conflicting decisions, the first establishing the construction by which to include all property situate in England, have finally, in the case of *Thom-*

son v. *the Lord Advocate*, 12 Clark, and Finnelly p. 1, by a solemn decision of the House of Lords, overruling the decision of the Courts of Scotland, and all of the English cases by which the Statute was made to include all property situate in England, settled upon the construction, that although in regard to real estate and legacies charged on real estate, the *situs* of the property is to govern, yet, in regard to personal property, the *domicil* of the owner, at the time of his death, is to govern; so as to exclude property of one domiciled abroad, and to include personal estate of one domiciled in England, even extending to property in the funds of Russia, France, Austria and America. *In re Erwin* 1, Cr. and Jerv. 151; 1 Tyr. 92. The conflict among the English cases, and the fact that the latest cases adopt the principle of construing the statute, so far as it concerns personal estate with reference to the domicil of the owner, to the exclusion of the principle of construing the statute, both as regards personal or real estate with reference to the *situs* of the property, induced this Court to take an *advisari:* the question being a very grave one.

After devoting to the question much consideration, we are satisfied that the true principle, both in regard to personal and real estate, is the *situs* of the property: and that the principle by which a distinction is made between personal and real estate, so that in regard to the former, a construction depending upon the domicil of the owner is adopted, is based upon a fiction, which has no application to "questions of revenue."—The construction which adopts the *situs* of the property is first suggested to the mind, and is yielded to at once, because it is based upon a fact; the property is here, it is protected and passes by force of our laws. The construction which adopts the domicil does not suggest itself, and the mind will not entertain it, except after a long argumentation and much ingenious and refined reasoning; because it is based upon a fiction. This makes it necessary to inquire, to what extent the original object for adopting the fiction, will justify its being carried?

In the case of *Thomson*, cited above, Lord Campbell evidently yields his first impression in favor of the principle of

the *situs* of the property, with some hesitancy, and feels called upon to use these very striking words: "At the same time my Lords, I believe that if the Chancellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised to hear that he was not to have his legacy duty on such a fund as this, where the testator was a British born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicil, and had left property that actually was in England, or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of domicil has sprung up in this country very recently, and that neither the Legislature nor the Judges, until within a few years, thought much of it; but it is a very convenient doctrine; it is now well understood, and I think that it solves the difficulty with which this case was surrounded.—The doctrine of domicil was certainly not at all regarded in the case of the *Attorney General* v. *Cockerell*, nor in that of the *Attorney General* v. *Beatson*. If it had been the criterion at that time, there would have been no difficulty at all in determining this question; but now, my Lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clew which will help us to a right solution of this question." This doctrine of domicil which neither "the Legislature nor the Judges, until within very a few years, thought much of," and is a very convenient doctrine, and is now well understood, was it seems, first advanced and adopted *in Re Erwin*, where one domiciled in England, had funds in Russia, France, Austria and America, and the domicil being adopted as the basis of the construction of the statute, in that case, where the revenue was much increased by it, the same principle was of course carried out *in Re. Bruce*, and in *Thomson* v. *the Lord Advocate*, where the revenue was diminished. But in all the cases, the question is treated as one affecting the public revenue. It is a probable supposition that in England, for every dollar having its *situs* there, but owned by one domiciled abroad, there are one hundred dollars having its *situs* abroad, but owned by one having his domicil there; so, on the score of revenue alone, the consideration for adopting the

principle of the *domicil*, rather than that of the *situs* of the property, was one hundred to one. In this State, such is not the case. There is no great difference between the amount of property here owned by persons domiciled abroad and the amount of property out of the State owned by persons domiciled here; so, upon the score of revenue, the consideration is equal on both sides, and the question is left open, and is to be decided upon principles of law and reason, applicable to the construction of statutes unaffected by the course of decisions in England, except so far as they involve principles of law, and are sustained by the reason of the thing. No one can read the opinion delivered before the Lords in the case of *Thomson* v. *the Lord Advocate*, which is the case in which the principle of the domicil is finally settled, without being struck with the fact that there is throughout, a marked paucity of reasoning. The amount of it is this: the very general words of the statute, "every legacy given by any will or testamentary instrument of any person," must of necessity receive *some* limitation in their application, for they cannot in reason extend to every person every where. The principle of domicil which is a well-known and fixed principle in reference to the distribution of the personal estate of deceased persons offers a very convenient general rule by which to put a limitation upon the generality of the words: therefore, it ought to be adopted as the rule of construction. It is true, the words are very general and there must be some limitation, for they are broad enough to include not only "every person every where," but "every thing every where," and they must be limited either by reference to the *situs* of the property, or the *domicil* of the deceased; but no reason is given, except that of convenience in its bearing upon the question of the public revenue, why the latter should be adopted and the former excluded; whereas for the reason stated above, it seems to us the former is the most obvious, natural, and proper principle by which to limit the generality of the words.

The principle of the *domicil*, which is based on the fiction that personal property attends the person, and is to be considered as being where the owner has his domicil, is adopted by

the comity of nations in reference to the distribution of the personal estate of deceased persons; but it has no application where the rights of creditors are concerned. Story's conflict of laws 354; *Moye* v. *May*, 8 Ire. Eq. 131. It has no application to the property of living persons; and in fact "the fiction" was only acted upon, in the single instance above stated, until its new application in England to a question of revenue, where it is not pretended that it is called for by the comity of nations, which is the admitted ground on which its application to cases of distribution is based. So we have a new application of a fiction without the ground upon which its former very restricted application is based. The argument stands thus; when creditors are concerned, we will not adopt the fiction, although it is called for by the comity of nations; in regard to the disposition of the surplus, after paying debts, we yield to the comity of nations, because no one having a *legal* right, is concerned in the question; but in regard to a question of revenue, although if the application of the fiction was called for by the comity of nations, we are justified in not yielding to it, because the sovereign would be considered as a creditor, we will adopt the fiction, notwitstanding the comity of nations has no bearing upon it! It is therefore clear, that the application of the fiction to cases of revenue is not only new, but must be put on some ground entirely different from that on which it has so long been applied to cases of distribution; and the only new ground that can be suggested for this new application of the fiction, is, that it will increase the revenue, and be a convenient rule of construction, and is not forbid by comity. Suppose a tax is imposed upon all the horses of every person, will the words be restricted by the *situs* of the property, or by the *domicil* of the owner? Must a tax be paid for every horse in the State without reference to the domicil of the owner, or must a tax be paid for a horse in Canada because his owner *lives here*, and a horse *here* be exempt, because his owner lives in Canada? Suppose a tax is imposed upon all gifts of personal property by any person, and one domiciled in Canada make a gift of a horse in North Carolina, can it be that the tax would not be payable? and, that if one domiciled

in North Carolina should make a gift of a horse in Canada, the tax must be paid?

But it is said, that the principle of the domicil is not applied to the property of living persons. That is true, and it is also true, that it has not heretofore been applied, except to the disposition of the surplus personal estate of deceased persons, and the reason is obvious. The notion upon which the principle of the *domicil* is based, that personal property attends the person and is where the owner lives, is a mere fiction, and its very restricted application rests upon the comity of nations; but in collecting debts and taxes, we must proceed upon the *fact*, and and consider the property as being where it actually is; in other words, the *situs* of the property must be the governing principle.

I have not referred to those portions of the opinion delivered in *Thomson* v. *the Lord Advocate*, which rests upon the mere words of the English statute so far as they seek to sustain the distinction between the probate duty and the legacy duty: they are immaterial.

So far as they seek to sustain the construction adopted by reference to the *letter* of the statute, they have no weight; for without saying there is any substantial difference between that statute and ours, *the words used are entirely different.*

It is said that letters testamentary or letters of administration, granted by our Courts, where the deceased had his domicil abroad, are ancillary or secondary; that the property situated here is not administered by *our* laws, but by the laws of the *domicil*, and that the statutes should be so construed as only to embrace such property as is administered by our laws. This argument would have much force if the position upon which it is based were true; but it is not true to the extent required by the argument, and the learned counsel, although notified that the proposition was not assented to, was unable to produce any authority for it, and was forced to rely on the fact that such administrations are spoken of in the books, as ancillary or secondary in general terms: It is evident that these terms are used simply to express the idea that the usual course, in case of a will, is for the executor, in the first place, to offer it

for probate, and to take letters testamentary in the country of the domicil, and *then* to offer it for probate and take letters testamentary in the country where the property is situate, and also, the further idea, that if a will be executed with the solemnities required in the country of the domicil, it will be held valid by our Courts, although not executed with the solemnities required in reference to the wills of parties domiciled here, and, that after the debts are paid, in the disposition of the surplus, our Courts from comity, adopt and act upon the laws of the country of the domicil, as *our law in reference to the particular case*, so as to hold those entitled who would be entitled according to the law of the country of the domicil; but all this is very far from reaching the proposition, that the property is not administered under *the authority of our Courts*, and by our law. It is clear, that the authority to act, the letters testamentary or of administration by which the property is collected and reduced into possession, must be granted by our Courts. It is also clear, that the debts must be paid according to the priority established by the general law, and that in regard to the rights of creditors, we refuse to adopt, as a special law for the particular case, the law of the country of the domicil; and it is also clear, that, in the payment of legacies, and the disposition of the surplus, our Courts consider those entitled, who are so, according to the law of the country of the domicil. So, the only question is, does this sustain the position that this surplus is not administered under the authority of our Courts, and by our laws? Certainly it is administered under the authority of our Courts; and it is equally certain, that to all intents and purposes, it is administered by our laws. The idea that our Courts administer the laws of an country, is a novel one; but the principle, that in particular cases, our Courts will adopt and act upon, as our law, the laws of another country, is a familiar one, and is well settled according to the comity of nations in reference to the disposition of the property of deceased persons, who have a foreign domicil; upon the ground, that if one makes a will which he believes to be valid, because executed according to the laws of his country, it would be hard to disappoint his intentions by

refusing to recognise it as valid in the country where his property may happen to be at the time of his death. Or if one dies intestate, under the belief that his property will belong to certain of his kindred, because such is the law of his country, it would be hard to disappoint his expectations by enforcing the general law of the country where the property happens to be, instead of adopting for his special case, the law of his country. When the English Courts adopted the law merchant, it could not be said they administered the law of the Romans. When we adopted the law of England, we made it our law; so, when we adopt the law of a foreign country for special reasons applying to a particular case, it is our law.

To test this question: if the person appointed executor qualifies in the country of the domicil, and then comes here and qualifies, collects the property, pays off the debts and the legacies out of the property which he gets here, the fact that he administers under our laws, may not be so strikingly obvious. But suppose he does not qualify here, and letters of administration with the will annexed are granted by our Courts to another person, can such administrator rightfully pay over the property to the executor and trust to him to pay the debts or legacies? He cannot; but is bound to pay to the extent of the assets, all creditors and legatees who apply within a reasonable time, no matter where they reside, and cannot relieve himself from liability to them by proof of his having handed over the assets to the executor, because being appointed by our Courts to administer, he is bound to do so; paying debts according to the general law, and legacies according to the special law adopted in reference to that particular case; and cannot excuse himself by saying that his appointment was ancillary or secondary. After paying debts and legacies, if there be no residuary legatees, he must pay the balance to the executor, provided he is entitled to it according to the law of the country of the domicil; but if he is not so entitled, the administrator must see to it, and pay to the persons who are entitled according to the law of the domicil, which is our law in reference to that particular case. In case of intestacy after paying the debts, an administrator appointed here, has no right

to hand over the surplus to the administrator appointed in the country of the domicil, and trust to him to pay it over to the next of kin or person entitled to it according to the law of the domicil. Our Courts require the administrator to give a bond and security, and protect the rights of the persons so entitled, as rights existing and enforceable under our laws; and the administrator of the domicil has no right to demand the fund unless he is the person entitled to keep it, according to the laws of the domicil; Sto. conflict of laws 423, sec. 513; *Hyman* v. *Gaskins*, 5 Ire. 267. These positions are all well settled, and prove, conclusively, that the position as contended for in the argument, is not true.

As the property situated here, belonging to a foreigner, is, after his death, protected and administered by our laws, there is the same reason for enforcing a tax upon it, as upon the property of our own citizens, under similar circumstances, and the statute should be so construed as to include both.

We have considered the question without making any distinction between the case of a will and one of intestacy, because our statute makes none, and puts both upon the same footing.

But it is proper to remark, in reference to the case of *Thomson* v. *the Lord Advocate*, which was mainly relied on, that is in the case of a will, and ours is one of intestacy, and a marked difference is made in the books between the two cases. An executor derives his authority and rights under the will, and they are recognized by the comity of nations beyond the jurisdiction of the Courts of the country of the domicil. But an administrator derives his authority and rights from the Court by which he is appointed, and they are necessarily confined to the limits of the jurisdiction of the Court under whose appointment he acts; this might in England furnish a ground for distinguishing a case of intestacy from that of a will; of course the decisions in reference to legacies cannot be a direct authority in a case of intestacy.

It is also said that the next of kin in Canada might have come here and collected the assets without administering, and therefore the statute does not apply, as the act of administer-

ors of the intestate to pay without suit. The position upon ing was unnecessary, or only made so by the refusal of debt- which this argument is based, is not true; the next of kin whether residing in Canada or here, has no rights except such as are derived from an administrator appointed here, and the debtor of the intestate could not rightfully pay either to the next of kin or even to an administrator appointed in Canada, and such payment would not protect him against the action of one afterwards appointed administrator here. So the appointment of an administrator by our Courts, was not only proper, but necessary. *Stamps* v. *Moore*, decided at this term, 2 Jones' Rep. 80.

In the case of *bona notabilia*, where the comity of nations is not concerned, the English Courts do not act on the fiction that the property attends the person, for the fact of its being situate in more than one diocese ousts the jurisdiction of the ordinary, and vests it in the metropolitan. The administrator here proceeds in the same manner as if the domicil was here, to administer the assets by paying debts and disposing of the residue; with respect to debts, he is governed by the general law; in disposing of the residue, he is to pay it to the person entitled; and the only difference is, that in ascertaining who are entitled, he is governed, not by the general law, but, by a special law which holds those persons to be entitled who would be entitled according to the law of the country of the domicil, if the property was situate there.

There is another view of the subject, which is equally conclusive in favor of fixing the construction by reference to the *situs* of the property. One dies domiciled in England leaving a will, the executor qualifies there and exhausts the assets there in the payment of debts; an administrator with the will annexed is appointed here, collects the assets that are here and exhansts them in the payment of legacies as he is bound to do, how can theCourts of England enforce the payment of the legacy duty? The executor is not bound, for he had no right to demand or receive the assets here, which were duly administered by one who is not within reach of the English Courts; and yet, such is the result of the construction by which it is

held that that property here, is liable for the legacy duty, because the domicil was there, and *e converso*, that the property there is not liable when the domicil is here. The exception to the commissioners report overruled.

Decree.

JOS, MASTERS AND OTHERS *against* F. J. PRENTISS AND OTHERS.

A Court of Equity will not entertain a bill for a discovery which seeks to set aside a prior deed of trust on account of usury.

Appeal from the Court of Equity of Craven County, at Fall Term, 1854.

Donnell and J. W. Bryan for the plaintiffs.

J. H. Bryan for the defendants.

Nash, C. J. The bill seeks to set aside a conveyance made by the defendant Prentiss, to the defendant Moore, upon the charge that it is usurious, and for that purpose, calls upon Moore for a discovery. To this portion of the bill, the defendant Moore, opposes a demurrer, upon the ground, that by the known and settled "rules of this Honorable Court, no person is, or ought to be compelled to set forth or discover any matter or thing, which doth, or may, subject him to any pains or penalties or *forfeitures whatever*." The demurrer must be sustained.—The right of a Court of Equity to enforce a discovery, lies at the foundation of its general power, differing from a Court of Law in administering justice between the parties before it, it constrains a defendant to bear witness against himself, and it provides for the defendant the right to put the plaintiff on the stand by a cross-bill, and to require of him a like discovery where needed. But in requiring a discovery, this Court does not depart from the general policy of the law. It will not require a defendant to answer questions or make discovery of matters tending to criminate himself, or to expose him to a penalty or a forfeiture. The first maxim on this subject, stated by Mr. Adams, page 3, is "that no man need discover matters tending to criminate himself, or to expose him to a penalty or a forfeiture. He has a right to refuse an answer, not only to the broad and lead-

ing fact, but as to any incidental fact which may form a link in the chain of evidence, if any one should choose to indict him." If the objectionable matter appears upon the face of the bill, the defendant, as he has done in this case, may demur, as if it alleges an usurious contract, &c., if it does not so appear, he may avail himself of the objection by plea; and if the facts are of such a nature as to exclude both a demurrer and a plea, he may obtain the defence in his answer. The protection does not extend to frauds. Adams 4. The bill charges that the deed of trust made by the defendant Prentiss, to the defendant, Bishop, in trust for the benefit of the defendant, Moore, and dated the 30th day of September 1848, and prior to the one made by said Prentiss to Joseph Masters in trust for the plaintiff, was usurious, and seeks to set it aside.

The bill then, is open to the objection stated in the demurrer: it seeks a discovery from the defendant Moore, of facts, which, if true, subject him to a forfeiture of the preference given to him by the deed of trust to Bishop. In that deed of trust he has an interest for the security of the debts enumerated in it, as due to the defendant by Prentiss. He is not, by the rules of Equity, bound to make any discovery, and his demurrer is sustained, and the interlocutory decree affirmed.

Decree below affirmed.

MARTHA TURNAGE AND OTHERS *against* CHARLES GREENE.

Where the right of a *cestui qui trust* to a trust estate is immediate and absolute, there being no ulterior limitation, and no continuing duty to be performed with it by the trustee, the Court will decree the legal estate to be conveyed to those entitled.

The Court will not allow a trustee to charge five per cent. for receiving and paying over dividends on bank stock.

CAUSE removed from the Court of Equity of Pitt County.

Benjamin Briley among other things bequeathed as follows: *Item* 6. All my bank stock I give in trust to my friend Charles Greene, for the use and benefit of my several heirs, namely, Martha Turnage, &c., (naming them) making in all

ten shares. It is my will and desire that my said trustee shall only receive the dividends accruing from said banks for the space of twenty years, and not to touch, sell or dispose of, in any way, the original amount in said banks invested, during that time, unless the bank or banks should sooner wind up its concerns: in that event, I wish him to receive both principal and the dividends and pay them over to my several heirs, as above directed. I wish my trustee to distribute the dividends as soon as he receives them, as directed above, to each of my children one tenth part, and to the children of Bennet Briley one tenth part, and to the children of Jesse Briley by his first wife, one tenth."

The administrator, with the will annexed, assigned the bank stock, owned by the testator, to the defendant, who is the trustee mentioned in the will, which has stood in his name ever since. He has received the dividends arising on the stock, and has offered to pay the same to the plaintiffs, who are the legatees mentioned in the above extract, *deducting five per cent* on such payments.

The plaintiffs in their bill, object to the commission charged, and pray that the defendant shall be decreed to assign the bank stock directly to them, and that he account and pay over to them such sum as may be in his hands, in the way of dividends.

The defendant answering, admitted the facts above stated, but insisted that he was entitled to five per cent commissions.

The cause was set for hearing upon the bill, answer and exhibit, and removed to this Court.

Rodman for the plaintiffs.
Attorney General for the defendant.

Battle, J. The question presented by the pleadings is fully answered by the case of *Jasper* v. *Maxwell*, 1 Dev. Eq. p. 357, which, in several respects, is very much like the present. In that case, one Stephen Outerbridge, bequeathed as follows: "Whereas, I leave fifty shares in the bank of the State of North Carolina, (naming twenty-six shares in other banks) it is my will that my daughter, Sarah M. Fenner, shall

have the profits arising therefrom during her natural life, or until the charters of the said banks may expire. I do, therefore, by these presents, leave the said seventy-six shares, in trust with my executors, and I do hereby authorize them to take charge of the said bank stock, and draw the dividends as they shall become due and payable, and the dividends when drawn by my executors, shall be paid over to my daughter, the said Sarah M. Fenner, for her use and comfort. Whenever the charters of the said banks shall expire, (if they shall not again be renewed), I do then give and bequeath the said seventy-six shares to my said daughter, to her and her heir forever."

Sarah M. Fenner, the daughter, was then a widow, but afterwards married and died; and her husband took out letters of administration upon her estate, and filed a bill against the executors to have the bank stock transferred to himself. The Court said: "The bank stock is bequeathed to the executors in trust to receive the dividends as declared, and pay them over to the testator's daughter during her life, or until the charters expire, and upon that event, (unless the charters should be renewed), the stock itself, is given to the daughter. In her, then, are united the present right to the whole profits, and the absolute, ultimate dominion, which gives as perfect a property as is known to the law. The *cestui qui trust* can call for the legal estate at her will. It is not like the case of a bequest, in trust for the maintenance of another. There, the trustee must retain the property in order to provide out of the profits for the support of the object of the testator's bounty. He must keep the fund in his own hands lest it be wasted. But here, the fund is to go (eventually) directly to the daughter, and in the mean while, the whole profits, not *as* a maintenance to be provided by the executor, but as a general pecuniary legacy." These remarks are directly applicable to the case before us, where a present right to the whole profits, as well as the absolute, ultimate dominion of the bank stock are given to the legatees, and they are therefore entitled to have a transfer of the stock made to them. The rule would be different, and the *centui qui trust* would not be entitled to call for the legal estate, if from the nature of the trust, their ownership were

not immediate and absolute, and it would defeat or put it into their power to defeat or endanger a legitimate, ultimate limitation of the trust property. *Dick* v. *Pitchford*, 1 Dev. and Bat. Eq. 480; *Battle* v. *Petway*, 5 Ire. Rep 576. See also, Hill on Trustees 278; 1 Cru. Dig. Tit. 12, ch. 4, sec. 6.

The result is, that all the plaintiffs, except the infants, are entitled to a decree that the defendant shall transfer to them the shares of the Bank Stock given to them under the will of the Testator. The defendant must still retain the shares belonging to the infants upon the trust declared for them in the will.

It is proper that this Court should declare that it would not sanction a charge by the trustee of five per cent. commissions for simply receiving and paying over the dividends of the Stock.

Per Curiam. Decree accordingly.

SETH WINDLEY *against* McGILLVARY BARROW.

Where eight witnesses swore that an actual partition cannot be made of land, without injury to all the parties, and six witnesses said they think it could be divided if laid off in a particular way, without prejudice to the whole, the Court ordered a sale.

Appeal from a decree of the Court of Equity of Beaufort County, at the Fall Term, 1854, by his Honor, Judge Caldwell, ordering a sale of the premises.

Stubbs for plaintiff.
Rodman for defendant.

Nash, C. J. The petition is for the sale of a tract of land, described in the pleadings. The defendant opposes the sale as being unnecessary, and avers that it can be divided without injury to the interest of the other parties concerned. *Prima facie*, each party interested in a tract of land, is entitled to an actual partition, and it is incumbent on him who asks for a sale to show, that his interest will be promoted by it, and that no loss will be worked by it to any other party. *Davis and others* v. *Davis and others*, 2d Ire. Eq. 607.

The laboring oar then is upon the plaintiff, and we are of opinion that he has succeeded in showing that a sale is more to the interest of the parties concerned than a partition would be. The contest in the case arises from the claim set up by the defendant who has transferred his share, one-sixth, to a man by the name of John W. Linton, and for whom he defends the suit, that it will be more beneficial to his, the said Linton's interest, to have the land divided, than sold. The reason assigned is, that Linton owns a tract of land adjoining that in question, and it will be to his interest to have his one-sixth of the land laid off to him adjoining his tract. In the Court below a reference was made to the Master to take testimony and report whether or not the interest of the parties will be promoted by a sale. A report has been made, and the Master is of opinion, from the evidence, that it will be to the interest of all parties to have the land sold. The testimony upon which his opinion is founded, is reported by him and fully supports it. Exceptions are filed,—none of which can avail the defendant. The case was argued before us as if Linton were the real defendant, and upon that ground we are willing it should be considered, although he is no party to the record. The whole of the testimony was with a view to that state of the case. Eight out of the fourteen witnesses concur in the opinion, that an actual partition cannot be made without injury to the whole of the parties, and the six witnesses, introduced by the defendant, say that if the one-sixth, claimed by the defendant, is laid off along Linton's line, that the land may be divided without injury to the other parties. Mr. Latham, the surveyor, thinks that the sixth so laid off would be injurious to the rest. All the witnesses unite in stating that nearly the whole of the wood-land, not embraced in the widow's dower, lies along the Linton line, and would be embraced in the one-sixth laid off as the defendant desires,—and represent the whole land, with some exceptions, as being poor and bare of wood. The claim by the defendant is a singular one, and it is manifest it cannot be allowed, without injury to the value of the remaining portions. In cases of partition, a Court of Equity does not act merely in a ministerial character, but it

administers its relief *ex æquo et bono*, according to justice and equity, between the parties. Thus if improvements have been made by one tenant in common on the land, a suitable compensation will be made him, upon the partition, or the portion on which the improvement has been made, will be assigned him.

So also Equity may assign to the parties respectively such parts of the estate as will best accommodate them, and be of most value to them, with reference to their respective situations in relation to the property before partition. *Story Eq. Jurisprudence*, sec. 656 b. 655. The object is to do equal justice to all the parties. But this case calls for no such exercise of Equity jurisdiction; it presents the case of one of the parties in interest claiming to have his portion laid off in a particular way, to the manifest injury of the value of the rest of the land; this would be anything but justice to the other tenants in common.

From the testimony on file, we are satisfied in order to do justice between the parties the land ought to be sold. The exceptions are overruled and the report confirmed.

There is no error in the decree appealed from.

PER CURIAM. Decree affirmed.

JAMES JOINER, ADM'R. *against* NOAH JOINER AND OTHERS.

A true and certain description of a Slave by name in a will cannot be obviated by a further, and unnecessary description which is untrue.

Where a will contains a clear and unambiguous disposition of property it shall not be allowed to be revoked by a doubtful expression in a codicil.

As a general rule, children of a woman slave, born after the making of a will, do not pass under a bequest of the mother, but if it is manifest from the will itself, that such issue was intended to pass, it will be so declared by the Court, and such intention may be manifested by a codicil as well as from something appearing in the will itself.

CAUSE removed into this Court from the Court of Equity of Pitt County, Fall Term, 1854.

The Bill was filed by the Administrator with the will an-

nexed, of John Joiner, to obtain a construction of the will. The clauses upon which the several questions arise are as follows:

"I give to my three grand-sons, John H. Hines, Robert Hines and Amos Hines, the children of my daughter Patsey Hines, a certain tract of land lying in the County of Greene; (describing it.) I also give to them the negro woman Rachel with all her children and grand-children which was in the possession of their mother Patsey Hines at her death: also I give to the aforesaid grand-sons the negro man Willis, the negro woman Hannah and the boy Urwin.

"4th. I give to my son Noah Joiner all the negroes I have heretofore put in his possession, and add to them now the cooper Joseph, the boy Allen and James."

Some three years after the execution of this will, the testator made the following additional clause:

"First. I do give to my son George Joiner the negro man Charles. I do give to my son Noah Joiner the negro man Howard, and to my son James Joiner the negro man Sampson, and to my son John, I do give the boy Allen who is before mentioned to my grand-sons. It is my will in the division of the negroes before mentioned to my grand-sons of the negroes, that John Hines do have the negro man Willis and that Robert Hines have the boy James and that Amos Hines have the woman Hannah and her child and all other children she may have."

At the time of making this will and codicil the testator owned one negro man named *Allen*, and two by the name of Jim or James, and never owned any others bearing those names; one of these latter two (James) was a valuable young man. The other James was very old, supposed to be near one hundred, and not only without value, but an expense.

There were, at the death of the testator, a number of valuable slaves not specifically bequeathed, which were disposed of in a residuary clause.

The bill alleges that there are difficulties in the way of making a settlement and final disposition of the property in his hands growing out of the apparent contradictions in several of

the bequests and the conflicting claims made upon him in consequence thereof. He represents, in his bill, that John claims the boy Allen by virtue of the additional clause or codicil who had been bequeathed to Noah in the body of the will, while Noah contends that the additional description of Allen as being one that had been given to his grand-sons in the body of the will shows that Urwin was meant and not Allen, for that Urwin had been thus given, but not Allen. The bill suggests that John claims Urwin if Allen be decreed to Noah.

Another difficulty is suggested in the Plaintiff's bill, which is that Robert Hines, one of the grand-sons, claims James by force of the additional clause set forth above, while Noah says that he is entitled to hold James by force of the 4th item in the will, for that the expression relied on is merely directory as to how a division shall be made of the property before mentioned and given to the grand-sons.

The bill further suggests that under the additional clause of the will, Amos Hines claims the child of Hannah which was born after the body of the will was executed, but before the codicil, while the residuary legatees insist that, by a fair construction of this clause, this child of Hannah belongs to them, for that the testator in this clause intended no new bequest to his grand-sons, but only to make a division of those already given.

The several defendants answer the bill and assert their several claims in the manner and for the reasons represented in the plaintiff's bill, except that Noah sets up no claim to have Urwin, in case Allen is taken from him.

The cause was set for hearing on the bill, answers and exhibits, and sent to this Court by consent of parties.

Stubbs for plaintiff.

Biggs, *Moore* and *Rodman* for the defendants.

BATTLE, J. The addition which the testator made to his will, in November, 1851, and which he calls an "additional clause," is undoubtedly a codicil. It was written more than three years after the will, and was intended to alter it in certain particulars. It comes, therefore, directly within the most ap-

proved definition of a codicil, which is "a supplement to a will or an addition made by the testator and annexed to and to be taken as a part of a testament—being for its explanation or alteration or to make some addition to, or subtraction from, the former disposition of the testator." 2 *Black. Com.* 500. *Williams on Ex'trs.* 8.

In the construction of wills, the leading and controlling object is, to ascertain the intention of the testator; and in order to accomplish this purpose, technicalities may be disregarded and irregularities of form overlooked. The same rule applies to a codicil so far as the construction is confined to itself: but when taken in connection with the will to which it is annexed, there is said to be a difference between inconsistent provisions when found in the body of the will itself, and when in the will and codicil, arising from the fact that in the former case, both provisions have effect from one and the same act of publication while in the case of the will and codicil the provisions contained in the codicil necessarily modify or revoke those inserted in the will. *Green* v. *Lane*, 8 Ired. Eq. 70, S. C. Busb. Eq. 102. Mr. Jarman, in his Treatise on wills, says that "numerous are the questions with regard to the extent to which a codicil affects the dispositions of a will or antecedent codicil and which are commonly occasioned by the person framing the codicil, not having an accurate knowledge or recollection of the prior testamentary paper." "In dealing with such cases it is an established rule not to disturb the dispositions of the will farther than is absolutely necessary for the purpose of giving effect to the codicil."—"Another principle of construction is, that where the will contains a clear, unambiguous disposition of property, real or personal, such a disposition is not allowed to be revoked by doubtful expressions in a codicil." See *Jarman on Wills*, 160 & 165. These propositions are supported by numerous authorities, and the principles, which they announce, will be found to afford material aid in clearing up the difficulties suggested by the pleadings in this case.

1. The first question is raised by the conflict between the will and codicil, with regard to the bequest of the "negro

boy Allen." The testator had but one negro boy of that name, and by his will he gave him in express terms to his son Noah; whereas in his codicil he says, "to my son John I do give the negro boy Allen, who is before mentioned to my grand-sons." The defendant John claims Allen under this bequest in the codicil, while Noah contends that the express gift of the boy to him by the will is not revoked, because he is described as having been given to his grand-sons, which shows that the testator made a mistake, and it is apparent that he intended to give to his son John the boy Urwin, who was mentioned to his grand-sons. We are saved the necessity of discussing this question upon principle, because it has been frequently discussed before and is settled by authority in favor of John. It is a clear case for the application of Lord Bacon's rule, that *veritas nominis tollit errorem demonstrationis:* the true and certain description of the boy Allen by his name, cannot be weakened by the further and unnecessary false description that he had been before mentioned to his grand-sons. *Proctor* v. *Pool*, 4 Dev. Rep. 370, *Simpson* v. *King*, 1 Ired. Eq. 11, *Ehringhaus* v. *Cartwright*, 8 Ired. 39, *Barnes* v. *Sims*, 5 Ired. Eq. 392, *Thomas* v. *Thomas*, 6 Term Rep. 671, *Goodtitle* v. *Southern*, 1 Maul. & Selw. 299.

The bill suggests that in the event the Court shall decide that the defendant John is entitled to the boy Allen, then the defendant Noah will claim that he is entitled to Urwin in his stead, but the answer of this defendant sets up no such claim; but if it did, there would be no pretence for it.

2nd. By one clause of his will, the testator gave to his son Noah, among other slaves, "the boy Allen and James." In the preceding clause he had given to his three grand-sons John H. Hines, Robert Hines, and Amos Hines, among other slaves "the negro man Willis, the negro woman Hannah, and the boy Urwin." In his codicil he declares that "it is my will in the division of the negroes before mentioned to my grand-sons of the negroes, that John Hines do have the negro man Willis, and that Robert Hines have the boy James, and that Amos Hines have the woman Hannah and her child and all other children she may have." The testator had but one

negro boy named James, but he had a man of that name nearly a hundred years old, who was not only of no value but actually expensive. At the date of his will, the woman Hannah had no child, but she had one born after the making of the will, and living at the date of the codicil. The defendants, Noah Joiner and Robert Hines, both claim the boy James, the former by the bequest in the will, and the latter under the codicil. The defendant Noah insists that the express legacy in the will to him is not revoked by the codicil, because the latter does not propose to give any thing to the grandsons, but only divides among them what had been already given by the will, and that the name of James was manifestly inserted by mistake instead of Urwin, who was bequeathed to the grand-sons and was not taken from them. The defendant, Robert, contends that the terms of the codicil imported an express bequest of the boy James to him, and was, therefore, a revocation of that to the defendant Noah, if indeed the boy James was given to Noah by the will; but he insists that the James mentioned in the will was the old man James, and if so, there was no conflict between the will and codicil. We certainly do not concur in the latter part of the construction contended for. A legacy imports a bounty, and we cannot, for a moment, believe that a father would mock his son by giving him, as an apparent bounty, an old negro, who was then and might be for several years a burden to his owner. He would rather, in proper terms, have confided the old man to his care and have given at the same time the means for keeping and providing for him. We say this without adverting to the fact that the term boy is applied to Allen, who is mentioned in the same connection with James, and the term may, therefore, have been intended to apply to both. The other part of the construction insisted upon, is not so free from doubt, but upon reflection we think that is against the claim of the grand-son. The clause in question certainly does not purport to give any negro not given before, but on the contrary provides for the division of the negroes "before mentioned" among his three grand-sons. James was not before mentioned in the gift to his grand-sons by the will, but the boy Urwin

was. We think, therefore, that taking the will and codicil together there is an apparent mistake of James for Urwin, and that the latter passes to the grand-sons and the former does not, thus giving effect to the rule herein before stated, "that where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil."

3rd. Upon the construction which we have just adopted as the true meaning of the last clause of the codicil, the residuary legatees of the slaves contend that they are entitled to the child of Hannah which was not born at the date of the will, and which they, therefore, contend did not pass under it by the bequest of Hannah to the testator's grand-sons. It is true that the general rule is that the bequest of a female slave, or of her and her increase will not carry any child she may have between the publication of the will and the death of the testator. *Stultz* v. *Kiser*, 2 Ired. Eq. Rep. 538. But if there be any expression in the will showing an intention on the part of the testator, that the child so born shall be included in the gift of the mother, then the legatee shall take it. *Love* v. *Love*, 5 Ired. Eq. Rep. 201. Such intention might be shown in a clause of the will subsequent to that in which the gift was made, and we can see no reason why it may not be manifested in a codicil; one office of which, as appears from its definition, is to explain the will. According to this explanation then, the defendant, Amos Hines, takes the child of Hannah as being included in the gift of the mother.

A decree may be drawn declaring the rights of the parties in accordance with this opinion, and the costs must be paid out of the assets in the hand of the plaintiff, as administrator with the will annexed.

Per Curiam. Decree accordingly.

GEORGE HURDLE AND OTHERS *against* JOSEPH B. OUTLAW, ADM'R.

A bequest of "all my property of every description" to "my good friend and relative" J. B. O., shows an intention to appoint "a universal legatee," and therefore, not only tangible property, but monies, stocks, bonds and choses in action, were held to pass by this bequest.

The next of kin have no interest in slaves bequeathed to one to be emancipated, and cannot properly bring suit in regard to them in their own names. Only the State or the slaves themselves, are interested in the question.

Aliter, where slaves are bequeathed in secret trust to be held nominally as slaves, but really as free persons. In such a case, the bequest would be void, and the next of kin might claim the slaves.

CAUSE removed from the Court of Equity of Alamance County, at the Fall Term, 1854.

The bill was filed by the plaintiffs as the next of kin of David Outlaw, deceased, alleging that he had made and published his last will and testament, which was solemnly admitted to probate, and which is as follows:

"It is my wish and desire, that my good friend and relative, Dr. Joseph B. Outlaw, have all my property of every description. DAVID OUTLAW.

Dec. 20th, 1848."

And that the defendant took letters of administration with the will annexed of the said estate, and as administrator took possession of all the estate of the testator, consisting of slaves and other personal property, also that he took possession of a sum of money and the evidences of debt due the testator consisting of bonds, notes, mortgages, certificates of stocks in Banking and other incorporated companies, and other choses in action, amounting to seventy-five thousand dollars.

The plaintiffs in their bill insist that, by a proper construction of the will above set out, only the tangible property passed to the defendant, and that the monies, bonds, stocks, choses in action and evidences of debt were not disposed of thereby, and that the same is distributable among the plaintiffs, as the next of kin of the deceased.

The plaintiffs further allege that the debts against the estate have been paid off, and they pray that the defendant may be

decreed to account and pay over to them the amount as to which the said David died intestate.

The plaintiffs in their bill further allege that among the slaves bequeathed to the defendant, there were two who were to be emancipated and set free; that the said David had, in his life-time, often so declared, and that the defendant, shortly after the death of the testator, in a letter written to a friend expressly admitted this to be the wish of the deceased and therein promised to effectuate this purpose, but that since that time the defendant has made sale of one of these slaves and received the value thereof in money. They allege their willingness that this slave may still be emancipated, and that the defendant may be compelled to re-purchase him for that purpose, but they insist if this cannot be done, and this trust shall be considered by the Court as void, that he may be compelled to account for the value of these slaves to the plaintiffs. The bill also prays for general relief.

To this bill there was a demurrer, alleging grounds applicable to the several aspects of the plaintiff's claim: a joinder in demurrer, and the cause being set for argument, was transmitted to this Court by consent.

Graham for the plaintiffs.
Moore, *Miller* and *G. W. Haywood* for the defendant.

Battle, J. An attentive consideration of the arguments of the counsel on both sides, and an examination of the authorities on which they respectively rely, have satisfied us that the demurrer is well founded, and that the bill must be dismissed.

In support of the construction of the will of David Outlaw, for which the plaintiff's counsel contends, he relies mainly, if not altogether, upon the case of *Pippin* v. *Ellison*, 12 Ire. Rep. 61, recently decided in this Court. The question in that case, arose upon the construction of the following clause in the will of John Wyatt: "I give and bequeath to Lydia Wyatt, all the balance of my property during her natural life, and at her death it is my will and desire, that the said property loaned to my said wife, shall be sold by my executor, with the exception of one acre of land, and the money,

it observed, is as large and comprehensive a term as can possibly be used."

We do not feel ourselves called upon, in this case, to decide what is the true meaning of the term "property," when used by a testator without any expression in the context to restrict, or extend or in any way to modify it, because we all think, that in the will under consideration, the words "all my property of every description" were intended to convey every thing of which the testator had the right to dispose. His purpose was to make his friend and relative, Dr. Joseph B. Outlaw, his "universal legatee," giving to him whatever things he owned, whether real, personal or mixed, and whether in possession or in action. Nothing less will satisfy the broad terms used, "all my property of every description."

The first part of the demurrer must, therefore, be sustained.

Our opinion upon the question raised upon the second part of the demurrer, is equally against the plaintiffs. They have no such interest in the emancipation of the slaves mentioned in the bill, as will sustain a suit for that purpose in their names. Whether the emancipation of slaves, directed in a will or assumed upon a secret trust, is such a public charity as will be enforced by a proceeding in the name of the Attorney General of the State, or whether it is a right which the slaves themselves can enforce, by a suit, are interesting questions which the present pleadings do not make it our duty to decide.

It is quite certain that the plaintiffs cannot enterfere in their own names. Had they charged as a fact, in their bill, that the defendant had taken the slaves upon a secret trust to permit them to remain in the State, nominally as slaves, but really as free persons, then the bequest, if the charge were true, would have been void, and the plaintiffs would have had such an interest in the slaves as would have entitled them to an answer from the defendant. But no such allegation is to be found in the bill. The only charge, on the subject of emancipation, is of such a trust as we have already said, the plaintiffs have no right to enforce. In the case of *Thomson* v. *Newlin*, 6 Ire. Eq. Rep. 384, the Court say, with regard to such a trust, that the right of the next of kin would seem to be ex-

tinguished, "for it does not belong to them to enforce it, nor does the breach of it work an injury to them, but only to the negroes or the State."

But it is argued for the plaintiffs, that they have a right to an answer from the defendant to ascertain the nature of the trust, so as to see whether it is a void one or not: That might be so were there any allegation of any state of facts that would make the trust void. But such is not the case, and for that reason the second part of the demurrer must also be sustained: the result of which is, that the bill must be dismissed with costs.

Pearson, J. It is not necessary for me to deliver an opinion in this case, as I fully concur in the decision upon the ground upon which it is put: *i. e.* from the words of the will, it was the intention of the testator to make the defendant his "universal legatee."

But, as I delivered the opinion in *Pippin* v. *Ellison*, 12 Ire. Rep. 61, and was guilty of uttering an "*obiter dictum*," by laying down a broader proposition than the decision called for, (which I have always endeavored most studiously to avoid) it is not improper for me to refer to *Campbell* v. *Smith*, 3 Hawks, 590, where the decision is put on the word "property" *per se*, and as used "in the Bill of Rights," does not include debts and other *choses in action*. Henderson, J. "A debt or duty is not *property* in the proper sense of the word, although to comply with the intent, it is often so taken. Property is a thing over which a man may have dominion and power to do with as he pleases: he may give, grant or sell it, at his pleasure.—A person has an interest in a debt or duty, but a *property* in a *thing* only, either natural or artificial. He cannot give or grant a debt or duty, because it is not property."

Per Curiam. Bill dismissed.

ANDREW BAGGARLY *against* ISHAM GAITHER AND WILFRED TURNER.

Where one, without notice of a prior equity, for a valuable consideration, obtains a transfer of a note as a security for debts due him, he may protect himself even after such notice, by taking an endorsement of the note, thus acquiring a legal title in aid of his equity, and the two rights, thus united, will prevail in a Court of Equity.

CAUSE removed from the Court of Equity of Iredell County, at Spring Term, 1854.

Boyden for the plaintiff.
H. C. Jones for the defendants.

PEARSON, J. In February 1847, the plaintiff bought of the defendant, Gaither, a tract of land, for which he gave his note payable twelve months after date, for $173 50. In July 1847, Gaither, by an instrument in writing, transferred the note to the other defendant, Turner, as security for the amount which Gaither then owed Turner, and for the amount that Turner was was liable for, as the security of Gaither.

In October 1847, Gaither regularly assigned the note to Turner in satisfaction of the amounts then due. After the maturity of the note, Turner as endorsee, took a judgment against the plaintiff.

The bill is filed to enjoin the collection of this judgment, upon the allegation that at the time of the execution of the note, there was an agreement between the plaintiff and Gaither, that the plaintiff should pay off such debts of Gaither as he might find it convenient to discharge, and "take up" before the note fell due, for which he was to be allowed a credit upon the note; that the plaintiff, in pursuance of this agreement, paid off several debts due by Gaither, which, added to the amount due to the plaintiff, for articles sold and delivered, equalled the amount of the note, and that the defendant, Turner, at the time he took the note in pledge, and at the date of the endorsement, had full notice.

Gaither denies that there was any such agreement at the time the note was executed, but admits that sometime afterwards, he did agree to allow the plaintiff credit on his note for

any debts that he might "take up," or for any articles that he might furnish over and above what Gaither should be entitled to as hire for his work, and for boarding the hands of plaintiff, which was estimated at $30 per month. Turner alledges that when Gaither pledged the note to him, Gaither owed him a large amount; and besides, he was liable as Gaither's security, and to induce him to make the pledge and enter into the instrument of writing, transferring the note for that purpose, he then advanced for him the additional sum of $50. He avers that at this time, he had no notice of any claim upon the note on the part of the plaintiff: he admits that he afterwards heard that the plaintiff set up a claim to be allowed certain amounts by way of set-off to the note, and that he then took an endorsement of the note for his protection, having agreed with Gaither, to take it in satisfaction of what was due to him, which, upon settlement, exceeded the amount of the note, by some five dollars. Upon the pleadings and proofs, it is left doubtful whether the agreement between the plaintiff and Gaither was mutually binding, so that the plaintiff was under any legal obligation to take up debts of Gaither, unless he might see proper to do so. If there was this want of mutuality, very clearly the plaintiff had no equity which attached to the note until he actually paid off the several debts, which he did, for the greater part, after the note was pledged to the defendant, Turner. The absence of an endorsement to this effect, tends strongly to show that the arrangemet was one of which the plaintiff was at liberty to avail himself, or not as he saw proper. We are not, however, called upon to decide this question, because it is clearly proven that besides what was then due to Turner by Gaither, and the amount for which he went Gaither's security, Turner did, at the time, make an advancement of the additional sum of $50, as a consideration to induce Gaither to pledge the note. The evidence does not sustain the allegation that Turner had notice of the plaintiff' equity, so as to weigh down the positive denial of the answer: consequently, Turner, when he took the note in pledge, acquired an equity equal to the supposed equity of the plaintiff, it is familiar learning that one who has, without notice acquired

an equity, may afterwards protect it by acquiring the legal title. The latter purchaser or *encumbrancer* in payment of his money, becomes an honest claimant in equity, and is entitled, if he can, to protect his claim; he is not bound to look for protection untit he has ascertained that danger exists. Adams 330, (162).

The payment of the $50 makes it unnecessary to enter into the questions, how far a security, taken for an *existing debt*, is entitled to the protection given in Equity to conveyances for valuable considerations. *Holderby* v. *Blum*, 2 Dev. and Bat. Eq. 51, was relied on inthe argument for the plaintiff. *Reddick* v. *Jones*, 6 Ire. 109 *Ingram* v. *Kirkpatrick*, 6 Ire. Eq. 423, have been called to our attention as seemingly contra.

Bill dismissed.

JESSE A. CLEMENT AND OTHERS *against* CHARLES CAUBLE AND WIFE.

In the descent of real estate, under the act of 1808, the next collateral relations of the person last seized, who are of equal degree, take *per stirpes*, and not *per capita*.

PEARSON, J. *dissentiente*. Under the act of 1808, land descends *per capita* among the next collateral relations who are in equal degree. When those more remote bring themselves up to an equality by the right of representation, they take *per stirpes*.

APPEAL from the Court of Equity of Davidson County, at the Spring Term, 1854, His Honor Judge MANLY, presiding.

Eve Clement, had two brothers, Adam and Henry, both of whom died in her life-time. Adam Clement, left him surviving; an only daughter, Susan, who married Charles Cauble.

Henry Clement, had seven children, Jesse A. Clement, Mary, the wife of William March, who has since died without children; Sarah, the wife of James Ryan; Henry, who died leaving seven children; Godfrey, who died leaving three children; Margaret Sain, who died leaving three children; and

John, who died leaving seven children. Henry, Godfrey, Margaret and John, died prior to the year 1851.

Sometime in the year 1851, Eve Clement died, without children, seized in fee of several tracts of land. At the Fall Term, of that year, this bill was filed for the purpose of having the land sold for partition, and the proceeds divided among the heirs at law of Eve Clement. The decree was obtained, the land sold, and a reference made to the Clerk and Master, to report how the funds arising from the sale, should be distributed.

The Clerk and Master reported that the fund should be divided into two equal parts, one of which should be paid to Charles Cauble and his wife, the representatives of Adam Clement. The other, to be subdivided into six equal portions, one of which was to be given to each of the children and the representatives of the children of Henry Clement.

The report was excepted to, and it was insisted that the division should have been equal among the nephews and nieces of Eve Clement, they being her next collateral relations, and that the grand nephews and grand nieces might represent their deceased parents. Upon the cause coming on to be heard, the exception was sustained, and it was decreed that the fund should be divided into seven parts, and that the distribution be as follows: To—

Jesse A. Clement, one share.
James Ryan and Wife, one share.
The eight children of Henry Clement, Jr., one share.
The three children of Godfrey Clement, one share.
The three children of Margaret Sain, one share.
The seven children of John Clement, one share.
Charles Cauble and wife, one share.

From which decree, Charles Cauble and wife, appealed to the Supreme Court.

H. C. Jones and *Winston* for the plaintiffs.
John H. Bryan for the defendants.

Battle, J. Eve Clement died intestate and without issue, in the year, 1851, seized of certain tracts of land in the Coun-

of Davidson, and leaving as her heirs at law, certain nephews and nieces, and great nephews and nieces, who were the children and grand children of her deceased brothers, Adam Clement and Henry Clement; of these, Susan, the wife of Charles Cauble, is the only child of Adam Clement, and the others, are the children and grand children of Henry Clement. Upon the petition of the heirs at law, the lands were sold for partition, and upon a reference to the Clerk and Master to ascertain how the proceeds should be divided, he made a report in which he declared that Susan Cauble, being the sole descendant and representative of her deceased father, Adam Clement, was entitled to one half, and that the other half was to be divided among the living children of Henry Clement, and his grand children by deceased parents, each of his children taking a share, and his grand children taking a share for each class as representing its deceased father or mother. To this report, the descendants and representatives of Henry Clement, filed an exception, and insisted that "the division should be equal among the nephews and nieces, they being the next collateral relations of Eve Clement, the person last seized, and the grand nephews and nieces representing their ancestors, and standing in the same place of their ancestors as though they were still living." The Judge, in the Court below, sustained the exception, and directed a division accordingly; and from the decree, Charles Cauble and his wife, Susan, appealed to this Court.

The question presented in the appeal is, whether Adam and Henry Clement, the deceased brothers of the person who died last seized, are the ancestors from whom, according to our canons of descent, the right of representation is to be traced; or whether their children, the nephews and neices of the *propositus*, who were living at her death are to claim in their own right, without regard to parentage, together with her great nephews and nieces, who are to take by classes, representing their deceased fathers or mothers, respectively?

It is admitted, that if the English canon of descent, which relates to the right of representation, is not changed or modified in this State by our canons of inheritance, which abolish

primogeniture among the males, and the preference of males over females, then the exception ought to have been overruled, and that the decree must now be reversed. But it is strongly insisted that such change or modification has been effected as a necessary consequence of the adoption of the canons to which we have referred. It is said, and that is the main basis of the argument, that the English rule is founded upon the double preference which their law gives, first to the male issue, and next to the first born among the males; and for this is quoted the high authority of Black. Com. vol. 2, page 218, and then the inference is drawn, that as we have abolished both preferences, the right of representation in the extent to which it is carried by the English rule, must fall with them. I do not feel myself bound to admit that the English rule was founded solely upon the two canons, by which Mr. Justice Blackstone has sought to justify it, in opposition to the Roman law on that subject; but if I were, I think I can show conclusively that our law, while abolishing the English canons of primogeniture, and the preference of males over females, has in all other respects, expressly retained their canon on the right of representation, in its full force and effect.

In order that my argument may be the better understood, I think it necessary to state in full, the English canons of descent. They are seven in number, and are as follows:

"1. Inheritances shall lineally descend to the issue of the person who last died, actually seized, *in infinitum*, but shall never lineally ascend."

"2. The male issue shall be admitted before the female."

"3d. When there are two or more males in equal degree, the eldest only shall inherit, but the females altogether."

"4. The lineal descendants *in infinitum* of any person deceased shall represent their ancestors; that is, shall stand in the same place as the person himself would have done had he been living."

"5. On failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules."

"6. The collateral heir of the person last seized, must be his next collateral kinsman of the whole blood."

"7. In collateral inheritances, the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the females however near,) unless where the lands have in fact descended from a female."

These canons or rules of inheritance, were brought by our ancestors to this country; prevailed here during the Proprietory and Provincial Governments, and surviving the revolution, were firmly established in the independent and republican State of North Carolina. Of this, we have the most unquestionable evidence in the recitals contained in the Act of the first General Assembly of 1784, by which the first change in our rules of descent was effected, (see Act of 1784, ch. 204 of the Rev. Code of 1820). That Act, after reciting that "whereas it will tend to promote that equality of property which is the spirit and principle of a genuine republic, that the real estates of persons dying intestate should undergo a more general and equal distribution than has hitherto prevailed in this State," proceeded to provide for an equal distribution of an intestate's land among his sons, and for want of sons, among his daughters, as tenants in common, requiring advancements to be accounted for, and establishing the right of representation in case any child, son or daughter, had died in the life time of his or her father, leaving lineal descendants. The third section of the same act, after a recital that "it is almost peculiar to the law of Great Britain, and founded in principles of the feudal law, which no longer apply in that government, and can never apply in this State, that the half blood should be excluded from the inheritance," declared that the half blood should succeed in certain cases, with the following *proviso* in favor of the right of representation: "If any brother or sister of the intestate shall have died in the life time of the intestate leaving issue, male or female, such issue shall represent their deceased parent, and stand in the same place he or she would have done if living, and shall be entitled to the same part or portion of the estate of his or their uncle or aunt, as

his or their father or mother would have been entitled unto if living, such part or portion to be divided among such representatives, if more than one, among all the sons, and for want of sons, among all the daughters equally, share and share alike, as to tenants in common, and not as joint tenants." In the 4th section it is enacted "that the same rules of descent shall be observed in lineal descendants and collaterals respectively, when the lineal descendants shall be further removed from their ancestors than grand children; and when the collaterals shall he further removed than the children of brothers and sisters."

The 7th section, after reciting that "Whereas, by the law of descents, as it now stands, when any person seized of a real estate, in fee simple, dies intestate without issue, and not having any brother or sister, such estate descends to some collateral relation, notwithstanding that the intestate may have parents living, a doctrine grounded upon a maxim of law not founded in reason, and often iniquitous in its consequences," enacted that, in such cases, the estate shall be vested in the father, and if he be dead, then in the mother in fee, unless the estate was derived from one of the parents, and then in that parent from whom it was so derived.

These enactments, it will at once be perceived, made radical and important changes in the law of descents in this State. They, after reciting the evils of the existing rules, abolished primogeniture among males; admitted the half blood to inherit in certain cases, and essentially modified the rule excluding lineal ascents. But they did not complain of, nor alter in the slightest degree, the principle of the canon of the right of representation, either among lineals or collaterals; so far from it the Legislature seemed anxious to prevent an inference to that effect. They, therefore, expressly declared the continued existence of that canon by the before recited *proviso* to the 3d section, and by the 4th section in terms too plain to be misunderstood, and too strong to be resisted:—

"*If any brother or sister of the intestate shall have died in the life time of the intestate, leaving issue, male or female, such issue shall represent their deceased parent, and stand in the*

same place, he or she would have done, if living, and shall be entitled to the same part or portion of the estate of his or their uncle or aunt, as his or their father or mother would have been entitled unto if living, such part or portion to be divided," &c.

Now it seems to me to be certain, that if this Act has not been altered in this particular, (and I think I can show that it has not) Susan Cauble, the only child of Adam Clement, who had died in the life time of his sister Eve, can claim under it without dispute, the part or portion of her aunt's estate, to which her father would have been entitled if he had survived his sister.

I think that I have advanced one sure step in my argument, by showing that the abolition of the right of primogeniture among males, did not either expressly or impliedly produce any change in the principle of the canon of the right of representation. I will now proceed further to show, that the admission of females into the inheritance on an equality with males, did not have that effect. I will, however, remark in passing, that doubts having arisen as to the proper construction of the Act above referred to, in relation to the admission of half blood and parents into inheritances in certain cases, another act was passed at the next session of the General Assembly, in October of the same year, by which it was explained and corrected. A reference to this amending Act, (see Act of 1784, ch. 225, see 2 and 3 of the Rev. Code of 1820) will show that it did not touch the rule of representation. Females were admitted into inheritances upon an equality with males by the Act of 1795, (Rev. Code of 1820, ch. 435) by this simple recital and enactment: "Whereas, by the before recited Act, (referring to the Act of 1784, ch. 204) the inheritance of land and other real estate in fee simple, descends to males in exclusion of females, contrary to the policy of our government, "*Be it enacted, &c.*, that all females shall be entitled to take by descent, equally with the males, share and share alike, according to the rules of descent upon males in the before recited Act; any law, usage or custom, to the contrary notwithstanding." The question upon the Act is, can it alone have the extraordinary effect of essentially changing by inference,

the principle of the rule of representation? So far from it, I think that it expressly recognises and confirms that principle. All females shall be entitled to take by descent equal with the males, share and share alike, *according to the rules of descent upon males in the before recited Act.* If I have succeeded in proving, that according to the before recited Act, the principle of the rule of the right of representation remained unaltered, then I have proved that it remained unaltered by the amending Act of 1795. I think that I have thus established, upon a firm foundation, the proposition which I proposed to demonstrate, that the principle of the English canon, on the right of representation, had been adopted in this State, and had not been abolished by our canons which destroyed the right of primogeniture among males, and the preference of males over females. There is but one other Act which affects the question, and an examination of that, will, in my opinion still further confirm my views. In the year 1808, the whole law of descents was taken into consideration by the Legislature, and was referred to a committee, the chairman of which was the late Judge GASTON, who had at that early day given indications of the eminence, in his profession, which he was afterwards destined to attain. The committee, through their chairman, made a report which it is necessary, for my purpose that I should give in full. "Mr. Gaston from the committee, who were directed to enquire into the expediency of amending the law of descents, reported that having assiduously examined the important subject referred to them, they find that the various Acts which have been passed to regulate the course of descents, are so replete with ambiguities, that it is difficult to understand the true meaning of the Legislature; whether it was designed to retain a preference in favor of the relations of the blood of the purchasing ancestor? Whether kindred on the part of the father were to have a prior claim to those of the mother? Whether the provision in favor of one-half blood over the other, did not apply to the whole blood also; whether the abolition of the distinction between males and females was confined to individuals or extended to stocks; and whether the provisions in favor of parents comprehended the

case of lands inherited by the intestate, are all questions on which the most intelligent may differ, and which must occasion the most extensive litigation. Your committee, conceiving that certainty in the law of descents, is of the utmost importance, and of universal consequence, have been anxious to discover whence this ambiguity in the existing law has arisen, that endeavoring to remove it, they might avoid the cause by which it has been occasioned. They believe that all these errors have arisen from the Legislature having undertaken to define with minuteness, the cases which might occur, and having undertaken to make provision for each of them, instead of establishing certain plain and general principles, which might be susceptible of application in every instance. Your committee, strongly impressed with this belief, have conceived it their duty to attempt the framing of rules, embracing such principles; and in making such rules, they have been studious to conform as nearly as might be, to the existing law. The three first rules, it will be perceived, do not introduce any innovation in those which now prevail, and would be altogether unnecessary were it not for the advantage which is derived from bringing together all the rules upon the subject. The fourth rule has for its principal object the securing to the family of the man by whose industry the property was acquired, the enjoyment of such property in preference to those who have no consanguinity with them. The fifth rule is designed to embrace those cases, in which the intestate was himself the first purchaser, and in which reason dictates that his nearest relations shall succeed to his estate, whether on the side of his father or mother. The sixth rule is but a simple affirmation of principles now existing. The *proviso* is founded upon that sentiment of natural affection which has received the sanction of the Legislature in the two acts of 1784. The committee have deemed it advisable to avoid all uncertainty, that the *proviso* should embrace every case in which the collateral kindred are more remote than the issue of brother and sister, and to prevent the inconvenience which might result from interrupting the general course of descent, they have proposed that the provision should be for life only. Your committee, do therefore,

recommend that the bill accompanying this report, entitled 'a bill to regulate descents,' be put on its passage, and enacted into a law." It was accordingly so done, and the bill became a law, and it is said without any amendment. (See note to *Wilkerson* v. *Bracken*, 2 Ire. Rep. 322, and see the Act among the Acts of 1808, ch. 739, of the Rev. Code of 1820, constituting the first six sections of the Rev. Stat. ch. 38.)

The report says: "*That the three first rules do not introduce any innovation in those which now prevail.*" The third rule is that which provides for the right of representation, and it is to be remarked, that it is substantially the same as the English rule on that subject. Indeed, it is almost a *verbatim* copy of the English canon. The most astute of critics cannot say that leaving out of our rule the words *in infinitum*, and inserting the conjunction "and" instead of "that is," makes it different in signification from the English. The term "descendants" signifies "persons descended from an ancestor in any degree," and embraces grand-children, great grand-children, &c. as well as children. This is so, independently of the fourth section of the first Act of 1784, (Rev. Code of 1820, ch. 204) which extends the right of representation to lineal descendants further removed from their ancestors than grand-children, and to collaterals further removed than the children of brothers and sisters. Such being the case, I feel bound to adopt the construction put upon the English canon. I can hardly conceive it possible that the learned author of the report, and draftsman of the Act of 1808, should, in framing rules of descent for the express purpose of removing ambiguities and producing certainty, have used the very language of a pre-existing rule unless he intended that it should have the same signification. I feel bound to contend further, that such is the only natural and proper construction of which the language of the rule is susceptible. If the number of the descendants of several deceased persons be different, is it not obvious that those of any one of such deceased persons will not stand in the place of their ancestors, if they take with others *per capita* instead of *per stirpes?* For instance, if the *propositus* had two sons and a daughter, all of whom had died in the life time of their fa-

ther, leaving the first son, six children, the second, one, and the daughter, ten; now, if upon the death of the grandfather, the grandchildren take *per capita*, the only child of the second son will get but a seventeenth part of the estate, instead of the third to which his father would have been entitled, had he survived his father, the *propositus*. A similar instance would show a like operation of the *per capita* rule when applied to the descendants of collaterals. That, it seems to us, is in direct opposition to the plain import of the words of the rule, and we therefore, cannot adopt it.

The result of my argument, when applied to the case before us, is, that when Eve Clement died, her lands descended, one half to her niece, Susan Cauble, as the sole descendant of her deceased brother, Adam Clement, and the other half to her nieces and nephews, and the children of her deceased nieces and nephews, as the descendants of her deceased brother, Henry Clement, to be divided among them, *per stirpes*. In coming to this conclusion, I have not relied upon the authority of *Ward* v. *Stowe*, 1 Dev. Rep. 67, because it is not directly in point, though the language of the Court favors the view which I have taken. Nor have I sought to sustain myself by the high authority of that eminent Judge and distinguished law-writer, Chancellor Kent, (4 Kent Com. 391,) because, with all due deference to those who entertain a contrary opinion, I think the argument upon these various provisions of our statutes is so clear, that it does not require. it.

As the Chief Justice concurs with me, the decree must be reversed, the exception to the master's report overruled, the report confirmed and a decree be entered accordingly.

Decree reversed.

Nash, C. J. I concur with Judge Battle, in his view of the case, that the descent is *per stirpes* and not *per capita*. It is not my intention to enter into an elaborate investigation of the subject; that has been already done; but to express in few words, my reasons for the conclusion at which I have arrived.

The main prop for the argument for the descent *per capita* is, that our canons of descent have removed the ground upon which the descent *per stirpes* rests, and under the maxim, *cessante ratione cessat lex*, the rule itself ceases. The maxim is a just and proper one when properly applied, but approaches so near to legislation, that it ought to be resorted to with great caution. We must recollect that all rules of succession to estates are creatures of the civil polity and *juris positivi* only, 2 Bl. Com. 211. There is certainly then no injustice done to any person whatever by the path of descent marked out by the municipal law. The English rules or canons of inheritances continued to be the law of this State down to the years '84 and '95, when they were materially altered. The 2nd section of the act of '84 abolishes primogeniture, and lets in all the sons; the third section lets in the half blood, and the last proviso provides for the succession of collaterals. Justice Blackstone, in commenting on the 4th canon of descents, which establishes the doctrine of representation, observes that—"This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and second to the first born among the males," 2nd vol. 218. Hence it is deduced as a corollary, that as the act of '84 abolished both rules, the maxim, *cessante ratione cessat lex* is applicable; but the maxim cannot apply; for in the 3d section of that Act which lets in the half blood, in the proviso, the Legislature declared, "that if any brother or sister of the intestate shall have died in the life time of the intestate, leaving issue, male or female, such issue shall *represent* that deceased parent, and stand in the same place he or she would have done if living, &c." Here there is an express declaration, in the same Act abolishing the feudal principles of males of the whole blood, taking in exclusion of the half blood, and of primogeniture, that the right of taking *per stirpes* shall exist independent of the 2d and 3d canon of the English law of inheritance; such was the *will* of the Legislature, *volentas stat ratione.*—When at the session of 1808 the whole subject was revised and new modeled, and new canons established, the 5th canon declares that "on failure of lineal descendants, &c., the inheri-

tance shall descend to the next collateral relations of the person last seized, &c., subject to the second and third rules." The 2d rule places females upon an exact equality with males, and the 3d is as follows: "the lineal descendants of any person deceased shall represent their ancestor and stand in the same place as the person himself would have done had he been living:" now incorporate into the 5th section, the 3d section, and it will read as follows, on failure of lineal descendants, &c., the inheritance shall descend to the collateral relations of the person last seized, who shall represent their ancestor and stand in the same place as the person himself would have done had he been living. You then have substantially, and in the last two lines where representation is provided, nearly the exact words of the ordinance of '84. Can there be a doubt then, that the Legislature, both in '84 and in 1808 intended to preserve the right of representation among collaterals, although the feudal grounds for the rule were removed? It is said further, that an adherence to the letter of the cannon will be sticking in the bark: Not so: when the Legislature has plainly expressed its will upon a matter within its jurisdiction, that will must be observed, and the Courts have no right to depart from it, except when it commands that which is in itself immoral or absurd. It is further said, the word *shall* used in the canon, is not imperative; it certainly is imperative on Courts of Justice in deciding upon conflicting claims of parties before them to an inheritance. It is not necessary for me to pursue the argument any further. Judge Battle has gone fully into it, and I concur with him in the conclusion to which he has arrived.

Pearson, J. *dissentiente.* Eve Clement left her, surviving, a niece, the only child of her deceased brother Adam, and a niece and nephew, children of her deceased brother Henry, and many great nieces and nephews, the children of four deceased children of her brother Henry:

Is the real estate to be divided into two equal parts, the child of Adam, taking *one* part, leaving the other part to be divided and subdivided among the children of Henry who are

living, and the representatives of those who are dead? or is it to be divided into seven equal parts?—the two nieces and nephews taking each one part and the children of the four deceased nieces and nephews, by classes or "*per stripes*," each class taking one part?

The question is an open one, for it has so happened, that the point has never before been presented to this Court for decision.

It is a principle founded on natural feeling, that upon the death of the owner, without making a disposition of it, his estate shall belong to his "next of kin." It is also a principle, which, although subservient to the former, is likewise founded on natural feeling, that one should not be excluded from a share of the estate of his deceased kinsman, if by representing an ancestor he can bring himself up to an equality with those who are the "next of kin." Upon these two general principles the distribution of estates, both real and personal, is based as the "corner stones."

That the first is founded on natural feeling all concede. If one dies, leaving seven children, this feeling suggests that they should share his estate equally, because they are all his children, so if one leaves as his next of kin seven grand-children, the same feeling suggests that they should share his estate equally, because they are all his grand-children—equally near to him, and for that reason presumed to be equally the objects of his affection without reference to the fact that some of his children, all of whom are dead, were blessed with more children than the others; for our affections, and the law which follows them, deal with the living, not with the dead. This is the presumption always acted on unless there be something to show to the contrary. For the same reasons, if one leaves as his next of kin, seven nieces and nephews, natural feeling suggests that they should share his estate equally, in the absence of anything to show that he intended to give a preference to those whose parents had the fewest number of children.

That the second is also founded on natural feeling all concede. If one dies leaving three children and many grandchildren by deceased children, nature suggests that the off-

spring of the children who are dead, should not be excluded by the children who are living, with whom their parents, if living, would have been entitled to share—so if there be two nieces and a nephew and many children of four nieces and nephews who are dead, nature suggests that the children of the deceased nieces and nephews should represent them: In these cases, reference is made to the dead, not upon the idea that they had rights which were transmitted to their offspring, but upon the feeling that the offspring of the *dead* should not be excluded by the living from the share to which their parents, if alive, would have been entitled as the *equals* of those who are living.

In regard to personal estate, these principles, both by the law of England and of this State, have full operation, with a single exception: among collaterals the right of representation is not admitted beyond brothers' and sisters' children: This is arbitrary, and was adopted to prevent, as far as possible, minute sub-divisions.

In regard to real estate, three considerations founded upon policy originating in the feudal system, are allowed by the laws of England, most materially to effect the operation of these principles, *i. e.* land should be kept in the blood of the first purchaser; males should be preferred to females: and the eldest son should alone inherit. Those much famed rules of that system are, from considerations of policy, so engrafted into the English Canons of descent, as to form their most prominent features, and cause them to be *rules for finding who among the kinsmen of a dead tenant is most fit to make a good soldier*, rather than rules of descent by which the estate shall devolve upon those most nearly connected to him by the ties of nature. In fact by that system, the property was considered as being in the sovereign and the tenant was seized "as of fee" in consideration of performing services: But in the progress of civilization these notions have changed and with us land is considered as the property of the individual, much the same as a horse or other thing. Accordingly, the rules of descent have assimilated very nearly to those by which personal property is distributed, and the two great lead-

ing principles are permitted to operate with but little restraint.

The policy of keeping land in the blood of the first purchaser, although retained, is greatly modified by our rules of descent, but it has no bearing upon our case: The claimants are all in the same line, so there is no conflict between the paternal and maternal lines, and the case is not complicated by the difference between descended and acquired land.

But the policy of preferring males to females, and of giving the whole real estate to the eldest son, is repudiated by our rules of descent, and the two English canons by which that policy was carried out are superseded by a rule putting females upon an equality with the males, and taking from the first born son any kind of preference. This is done expressly on the ground that the policy of the feudal system does not obtain here, and that natural feeling and justice require that there should be an equality among all the kinsmen of a deceased owner, who stand *in equal degree.*

These general remarks are made for the purpose of showing that the object of the Act of 1808, upon which we are to put a construction, has not been accomplished, if, according to that Act, one niece be entitled to *one-half of the estate*, while another niece who is also one of the "next collateral relations of the person last seized, and stands in equal degree" with the former, is to receive only one-twelfth part. Any one will admit that all in equal degree ought to stand on the same footing, and that if the law be not so, it ought to be so; and I will remark that if it is not so, it must be ascribed to a singular oversight in the framer of the Act of 1808, and that if, by using nearly the same words, in which the English canon, in regard to the right of representation is expressed, the necessary effect is to produce this inequality, then he marred his own handy-work, and much will be taken from the meed of praise that has been heretofore universally accorded to him for framing an Act, which it was believed, relieved us from all of the inequalities and peculiar effects of the English canons of descents, originating in the feudal system, and put our rules of descent upon the "great principles suggested by natural feeling and justice."

It is true this Court cannot make laws, but it is its duty to put a reasonable construction upon the laws that are made, and to enable it to do so, the object for which a law is made should be taken into consideration, as well as the words in which it is expresssd.

The question depends upon the construction of the 4th and 5th rules of descent, "on failure of lineal descendants, the inheritance shall descend to the *next collateral relations* of the person last seized subject to the 2nd and 3rd rules." The 2nd is, females shall inherit equally with males and younger equally with other children. The 3rd is, "the lineal descendants of *any* person deceased, *shall* represent *their ancestor* and stand in the same place as the person himself would have done, had he been living."

Who are the next collateral relations of Eve Clement?—Her two nieces and nephew occupy that position on *their own footing*. The children of her deceased nieces and nephews occupy that position by the right of representing their parents—so her two nieces and nephew, and the representatives of her deceased nieces and nephews are her next collateral relations subject to the 2nd and 3rd rules; for the 2nd has its operation—females and younger children being put on equality with the eldest male; and the 3rd has its operation—the children of the deceased nieces and nephews being allowed to take the place of "their ancestors." I think it clear that this construction gives full force and effect to the words of the statute, and carries out its full meaning and intent. It is said this construction does not give to the 3rd rule full operation, and to do so, it is necessary for the two nieces and the nephew likewise to represent their ancestors as well as the great nieces and nephews; I ask for what reason are the nieces and nephews to be called on to take by representation? They are entitled on *their own footing* as "next collateral relations" of their aunt, and not as descendants of any person deceased, who must represent their ancestor in order to entitle themselves to a share. To this two replies are made. 1st. The 3rd rule uses the words *shall represent* their ancestor, so it can make no difference whether it is necessary

for them to do so in order to gain an equality with others or not, the word *shall* being imperative. If this was the literal import of the word, the construction contended for would fall under the maxim, "*hæret in litera hæret in cortice;*" because there is no reason for such a construction, and it is inconsistent with the general scope of the statute. But such is not the literal import of the word,—"shall" is not used in the sense of a command, but as declaring a right. It is apparent the object of this rule was to give the right of representation to descendants, however remote, and the words are used in contrast to the statute of distributions which provides "there *shall be no representation admitted* amongst collaterals after brothers' and sisters' children," and the import of this rule of descent is, "the right of representation shall be admitted *in infinitum*."

The idea that a person who is entitled to a share of an estate, as one of the next collateral relations on his own footing, *must* represent his ancestor and take, not the share to which he is so entitled on his own footing, but that to which his ancestor would (if living) have been entitled, can only be supported on the ground that "representation" is an "*obligation*" and not a *right*.

That representation is a *right*, and not an *obligation*, is manifest from any book treating on the subject that has ever been published, either in England or America. In the English books, representation is put on the ground that the offspring of one ought to be allowed to take the share that his ancestor (if living) would have taken, Blackstone B. 2, page 219—"The same *right* of representation," &c.; "yet this *right* does not appear to have been thoroughly established in the time of Henry 2nd, when Glanville wrote." The idea that representation is an *obligation* imposed by law upon those who are entitled on their own footing, is new, and the expression, the "obligation of representation" is by no means a familiar one. So (as I conceive) this reply to the position taken by me, has no sufficient ground to support it.

But the reply in the second place is, "we derive our laws from those of England:" it is well settled there, that real estate descends "*per stirpes*," and according to that mode of descent

the estate in controversy, must be divided into two equal parts, of which the child of Adam takes one part, and the adoption by the Act of 1808, as one of our rules of descent of the English canon in reference to representation in almost its very words, although it may be inconsistent with the general intent as evinced by the other rules, is obligatory upon the Courts, and we are forced, although it may be against the reason of the thing, to put the same construction upon these same words, as had been before put upon them by the English Courts. This is the point upon which the question rests.

I admit that, if the rule in regard to representation was expressed in direct terms, so as not to admit of any construction other than that positively expressed by its terms, this Court would be bound by it, although it should be of opinion that the law, as so expressed, was inconsistent with the general scope of the other rules in the statute. For instance, if the the 6th English canon had been retained, "the collateral heir of the person last seized, must be his next collateral kinsman of the *whole* blood," there would have been no room for construction; and although such a rule was inconsistent with the general scope of the statute, and in the opinion of the Court the reasons upon which it had been originally adopted had ceased, still the Court would be bound to carry it into effect.

But the rule in regard to representation is not expressed in direct and positive terms; on the contrary, it is expressed in general terms, and requires a resort to construction in order to give it any meaning at all; in fact the only meaning that can be given to it depends upon the other rules with which it must be taken in connection. It was taken by the English Courts from the Roman law. Blackstone tells us that it was "not fully established in the time of Henry II, when Glanville wrote." As construed by the Roman jurists, the right of representation only applied when it was necessary to take the place of an ancestor, in order to be put on an equality with others who were nearer in degree; and yet when it was finally adopted in England, although the same words are used to express it, the English Courts felt at liberty to put upon it a different construction, because of its connection with their

other canons of descent; and nevertheless, afterwards, in the statute of distributions, where the same law was adopted from the Romans in regard to personal property, the Courts also adopted the construction of the Romans, and not that which they had given to it in reference to real estate. Blackstone accounts for this difference of construction in the following way: After saying that by the Roman law, land descends *per capita*, except where it is necessary to resort to representation, he adds, "this mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males, to both which the Roman law is a stranger: For, if all the children of three *sisters* were, in England, to claim *per capita* in their own right, as next of kin to their ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude not only his own brothers and sisters, but all the issue of the other two daughters, or else the law in this instance must be inconsistent with itself, and depart from the preference which is constantly given to the males and the first born among persons in equal degree, whereas by dividing the inheritance according to the roots or *stirpes*, the rule of descent is kept uniform and steady: The issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of *two daughters* divide the inheritance between them, provided their mothers (if living) would have done the same; and among these several issues or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain as would have obtained at the first among the roots themselves, the sons or daughters of the deceased." Blackstone 2 B. Ch. "descents" page 218. This (it seems to me) is conclusive of the question: it shows that the construction put on this canon by the English Courts was a consequence of its connection with the *two canons*, giving preference to males and to the eldest male. We have adopted the rule in reference to representation, in almost the same words in which it is expressed both in the Roman law and in the English law. How can we adopt

the construction put upon it, in the latter, when, with us it is not connected with two canons like those of England, but is connected with a canon abolishing these two canons, and announcing the very reverse of them to be the law of this State? *Cessante ratione cessat lex:* and how can we refuse to put on it the construction that obtained in the former country, where, like with us, there was no feudal policy to prevent the application of the two general principles before stated? Neither the Roman law nor the English canon, nor our rule designates *what ancestor* the descendants are allowed to represent. Is it the father or the grand-father or the great grand-father? This is left open and must be fixed by construction. The proper construction evidently is, "*that ancestor whom it is necessary for the descendant to represent in order to prevent his exclusion from a share of the estate according to the other canons.*"

If this case stood for decision in England, it is clear that the eldest son of the eldest brother would take the whole estate, or if he be dead, his only daughter or eldest son would take the whole; for this peculiar English mode of representation has no application except *where the nearest of kin* are all females, as in case of deceased daughters or deceased sisters: our rules abolish the distinction between males and females. So if the English construction obtains here, it will not only apply to cases where the nearest of kin are all females as in England, but will apply to all cases, although as in our case, that of two deceased brothers, in England, it had no application. The result is that, contrary to the general scope and the particular intent of our Act of 1808, framed by a very wise man, after due consideration, the English construction is to prevail, not only in cases where the nearest of kin are all females, but is to be extended to all cases whatever: and our rules, by which the preference of males and of the eldest son is abolished, (which constitute the only ground upon which the English construction of the canon, in reference to representation is based,) are to be so interpreted, as to extend the application of that mode of representation to cases, to which it does not apply in England.

The only thing that can be relied on, to give color to the po-

sition that the English doctrine of descent *per stirpes* obtains in this State, is a passage in Kent's Commentaries in the lecture on descent, vol. 4th, page 391. After showing that, by the law of New York, those in equal degree, taken "*per capita*," he says, "Inheritance *per stirpes* is admitted when representation becomes necessary to prevent the exclusion of persons in a remote degree, but when they are in equal degree, as are, for instance, his grand-sons, representation is not necessary, and would occasion an unequal distribution of the estate, and they accordingly inherit *per capita*. This is the rule which prevails throughout the United States, with the exceptions of Rhode Island, North Carolina and (four other States,) and it agrees with the general rule of law in the distribution of personal property." He cites no case as authority for thus putting North Carolina in the unenviable position of being one of the very few States whose laws, as construed, occasion an unequal distribution, and conflict with the general principles founded on natural feeling, and we are left to conjecture that he adopted his conclusion hastily, from some general expressions used *arguendo* in *Ward* v. *Stowe*, 1 Dev. 67, decided 1826. The case turned upon the construction of the word "heirs" in a will: Henderson, Judge, uses the general expression that land descends *per stirpes* and not *per capita*, and says this was never doubted for a single moment as far as he can collect from authorities. Judge Kent's 4th vol. was published shortly after this decision, and he adopted the general expression without noticing that its meaning was qualified and restrained by the instance given. "A has a daughter and two grand-daughters, daughters of a deceased daughter: his land descends one-half to his daughter and the other half to his two grand-daughters." This case was overruled in 1834, 1 Dev. Eq. 509, but the question of descent *per stirpes* and *per capita*, was not involved in the decision. It is true, that in the instance, put by Judge Henderson, the grand-daughters take *per stirpes*, and this falls precisely within the right of representation according to the second general principle above stated, because it was necessary for them to represent their mother in order to bring themselves up to an equality with

their aunt, so as to entitle themselves to a share of the estate: but it is very far from showing that in despite of our statute, abolishing the two English canons, we still sustain a doctrine which is based on them. The learned commentator evidently lost himself in the vast field over which he was attempting to run. Nor is it a matter of surprise that there should be some inaccuracies and some conclusions hastily drawn by an author who attempts, in a single lecture of some fifty pages, to give the law of descents in the State of New York, to which his attention is particularly directed, and the law of the Jews, and the Athenians, Romans, Arabs, Gentoos, and also the law of descents in England, France, Spain, Germany, and all of the several States of this Union. Indeed, it is doing injustice to the memory of that very learned man to suppose that he ever expected that such general statements, made by him for the sake of illustrating the subject upon which his attention was particularly fixed, would ever be cited as an authority to show the law of any State save that of New York.

It remains only to make an application of the construction fixed on, to the case before us, by way of further illustration of the subject.

The descendants of the deceased children of Henry have the right of representation, because otherwise they would be excluded, not being in equal degree with their uncle and aunts, and their cousin, the daughter of Adam. Their parents are the "ancestors" to be represented, because it is *necessary* for their descendants to represent them in order to gain an equality with the next collateral relations, and thereby entitle themselves to a share of the estate; by so doing, they take as "classes," one-seventh part respectively, but there is no necessity for them to go higher and represent their grand-father: so he is not the ancestor to be represented, and there is no reason, according to our rule, why they should be *required* to make this double representation, first of their parents, and then of their grand-father, and take a twelfth instead of a seventh part of the estate.

The two children of Henry who are living, are "*next collateral* relations" and as such, are each entitled to a share in their

own right; there is no necessity for them to represent any one, so there is no ancestor of theirs to be represented; they each take a share under the 4th and 5th rules—the nephew taking subject to the right of the female and younger children, and all taking subject to the rights of the descendants of their deceased brothers and sisters under the 3rd rule. Thus each takes a seventh part, and no reason is suggested why they should be *required* to represent their father and take only one-twelfth part.

The daughter of Adam is entitled to a share in her own right as a next collateral relation, subject to the 2nd and 3rd rules as above stated, that is one-seventh part. No reason can be conceived, under our rules, why it should have been the intention of the law-makers to *require* her to represent her father and take one-half of the whole estate.

Suppose the daughter of Adam had died leaving a child, under the 3rd rule it would have the right to represent its mother and take a seventh part, but can it be supposed that it was the intention of the law-makers to *require* the child to represent its grand-father and take *half?*

The acts of 1784 and 1795, which are pressed into the argument, have (as I conceive) no bearing on the question—the act of 1808 expressly supersedes all prior legislation, and the words "If any brother or sister of the intestate shall have died in the life-time of the intestate leaving issue, such issue shall represent the deceased parent, &c., and shall be entitled to the part of the estate of his or their uncle or aunt, as his or their father or mother would have been entitled, to if living," &c., are fully satisfied by giving to them the effect of preventing a *living* brother or sister from excluding the issue of a deceased brother or sister; there is no authority or reason for extending this application so as to produce inequality among those who are in equal degree and may claim, in their own right, as next collateral relations.

C. T. ALEXANDER AND J. W. ROSS Ex'rs. *against* CYNTHIA FOX AND OTHERS

Where executors have been led by statements of the will under which they act, to believe that the fund therein set apart for the payment of debts is sufficient for that purpose, and thus believing, have assented to the legacies, and let all the other property pass out of their hands, and it turns out that the fund provided for the debts, although prudently managed, is insufficient to discharge the same, such executors may call upon the legatees, in Equity, to make good to them advancements made to the creditors out of their own means.*

CAUSE removed from the Court of Equity of Mecklenburg, at the Spring Term, 1854.

Doctor Stephen Fox died in the County of Mecklenburg, having made and published his last will and testament, in which the plaintiffs were appointed executors. Amongst various other dispositions, he devised and bequeathed a "certain tract of land called, the hermitage, and a small tract near the town of Charlotte: a crop of cotton on hand; such debts as were owing to him, and all his unwilled personal property as a fund for the payment of his debts," and he gives it as his opinion, in making this disposition, that there will be a surplus arising from the sale of this property, over and above the payment of his debts, which surplus he goes on further in his said will to dispose of. The remainder of his estate, real and personal, (which was large) he gives by his will, to his wife and children (the defendants) in certain proportions and on certain terms, which are not necessary to be set forth more particularly.

The bill states that the testator was a business man of much intelligence, and they confidently relied upon the opinion thus expressed by him as to the sufficiency of the fund provided for the payment of his debts: and so confiding and believing, they permitted the defendants, who desired to keep together, as a family, to have and retain possession of all that was thus willed to them, being all the testator's property except the fund set apart for the debts, and that they took no refunding

*Decided at Morganton, at the last Term, and omitted in former report by accident.

bond from them; that they husbanded and managed this fund in the most diligent and careful manner, but contrary to their expectations, it proved inadequate to discharge the debts: that the land proved much less valuable than was anticipated by them: the cotton crop yielded a smaller sum: the debts owing to the testator were less, and the debts owing by him greater than they had believed: so that after realizing and paying out all they could raise from this fund, they had to advance, out of their own means, large sums towards the unsatisfied debts against the estate, and have received nothing for commissions: particularly, they had to advance out of their own money to one Springs, the sum of $2245 78: that they have frequently called upon the defendants to make good this sum, as well as their commissions to plaintiffs, but, except the sum of $415, paid by defendant Brem, they have utterly refused, and still refuse to make to the plaintiffs any payment on this account.

The prayer is, that the defendants account and pay out of their legacies and bequests, according to each one's share, the sums thus advanced for their testator's estate, and their commissions. The defendants are the devisees and legatees under the will.

The answer of the defendants denies that the plaintiffs used the proper diligence in the managemont of the fund set apart for the payment of the debts, and aver that they were guilty of gross negligence therein, especially in the collection of debts due the estate, many of which were lost by the negligence and inattention of plaintiffs, and in the sale of the cotton.—They aver that the fund provided by the will, would have been fully sufficient to pay the debts if it had been prudently managed: that they were aware of the debts at the time they paid over the estate to them: that no sudden depreciation has has taken place in the assets, and none lost by accident: they submit whether the plaintiffs can call on them to refund.

There was replication to the answer and proofs, and the cause set down for hearing, and sent to this Court.

Osborne and *Boyden* for plaintiffs.

Craige, *Wilson* and *Bynum* for defendants.

Pearson, J. If an executor assents to the legacies and permits the property of the estate to pass out of his hands, without taking refunding bonds, or retaining funds sufficient for the payment of the debts, and is afterwards compelled to advance his own funds to discharge them, it does not follow as of course, that he may come into a Court of Equity to have the amount refunded by the legatees, on the ground that he was mistaken: For, it was his duty to keep regular accounts and to take care to retain assets enough to pay the debts; and to allow him to recover from the legatees, after he has permitted them to take the property, except under peculiar circumstances, would be to give direct encouragement to gross carelessness and neglect of duty, to say nothing of the unnecessary litigation to which the legatees are subjected, and the fact that when one, receives property as his own and uses it as such, he may frequently be subjected to much inconvenience by requiring him to account for it and pay it back. He may well say to the executor "it was your business to keep the accounts, and I have a right to consider what you paid to me as my own," *March* v. *Scarboro'*, 2 Dev. Eq. 533. There are, however, peculiar circumstances which will entitle an executor to relief—as if a debt of which he had no notice, should be established, or if the value of the funds retained to pay debts should, by accident, be impaired or any other circumstances which rebut the presumption that the necessity for advancing his own funds originated in his own carelessness and loose manner of keeping the accounts.

The circumstances relied on by the plaintiffs as entitling them to relief, are—the testator was a man of large estate; a prudent business man, who kept strict account of his means: by his will, he gives his negroes, his land, except two tracts, to be divided among his wife and children, who, at the time of his death, were living together as one family and had the property in their occupation, &c.: the testator, by his will, sets apart certain property consisting of two tracts of land, his crop on hand, and the debts due to him for the payment of his debts, and declares that he believes there will be a *surplus* of this fund after discharging all of his debts, and directs the

manner in which this supposed surplus is to be appropriated:

The plaintiffs aver that, acting under the confident belief that the testator understood the condition of his own estate, and had not deceived them, and being disposed to consult the wishes of the widow and children in regard to not taking the plantation and negroes into their possession, and also the intention of the testator as manifested by his setting apart a fund to pay his debts, and declaring that it was more than sufficient for that purpose: they allowed the widow and children to to keep the property and divide it among themselves.—They aver further, that they took into their possession, the fund set apart for the payment of debts and proceeded with the utmost diligence and economy to administer it, by selling the real estate and the crop on hand and collecting the debts due the estate, but by reason of a fall in the price of cotton and their inability to collect many of the debts due the testator, who was a practicing physician, many outstanding accounts could not be made available, and from other causes the amount which they were enabled to realize from the fund set apart for the payment of debts, turned out to be insufficient for that purpose, and they were forced to advance a large amount out of their own funds.

The defendants do not take issue upon these allegations, except that in regard to the fund set apart for the payment of debts; and they aver that the fund was amply sufficient if it had been properly administered, and that the plaintiffs are guilty of gross negligence and mismanagement in regard to it, especially in reference to the collection of the debts of which there were many small ones that might have been saved, and in making sale of the cotton and corn on hand.

The averment of the plaintiffs, if true, certainly makes out a case which entitles them to relief, and the only matter about which the parties are at issue is, in reference to the administration of the fund set apart for the payment of the debts: if this fund was sufficient at the death of the testator and became insufficient afterwards by the negligence or mismanagement of the plaintiffs, their equity is fully met.

This presents a question which we cannot, at the hearing,

effectually deal with, and there must be a reference to the clerk to acquire, and impart to the Court the necessary information in regard to it. Adams' Eq. 375 ib. 379.

Ordered accordingly.

RULE BY THE COURT.

Iredell on Executors, may be read by applicants for license, at their option, instead of the authors now required.

MEMORANDUM.

The Hon. Samuel J. Person, of Wilmington, who had received the temporary appointment of Judge of the Superior Courts, by the Governor and Council, was appointed to that office by the General Assembly, at its last session, in the place of Judge Settle, resigned.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1855.

F. A. AND C. W. BROTHERS *against* CALEB CARTWRIGHT AND OTHERS.

A Testator devised as follows: "I give to my daughter E. a farm, &c., and after my wife's death I wish the land sold, and the proceeds divided among my children and their heirs." It was *held*, that the effect of this clause was to make the land personal estate from the time it was ordered to be sold, and that the proceeds were distributable as personal estate.

The word *heirs*, as applied to personal estate, means those who would take according to the statute of distributions.

CAUSE removed from the Court of Equity of Pasquotank.

The plaintiffs, as executors of Miles Brothers, and in their own rights, set out in their bill the following two clauses of the will of their testator, viz:

Second clause. "I give and bequeath unto my daughter Emily the farm known as the Andrew Brothers' tract, containing about fifty acres; and after my wife's death, I wish the land, last mentioned, sold, and the proceeds divided among my children and their heirs."

Seventh clause. "I give and bequeath unto my son, C. W. Brothers, twenty-five acres of wood-land, lying near Newbegan Creek, adjoining W. H. Davis and others, to be laid off on that side immediately contiguous to the said Davis' land; and all the remainder of said wood-land (that is, one-half of it) I wish sold, and the proceeds divided among all my heirs, and the balance to my grand-daughter, Margaret Ann Brothers, and her heirs:" and ask for a construction upon the same by this Court.

The testator died about the month of February, 1848, leaving his wife Nancy, surviving, who died in May, 1852, and four children, to wit: Martha, who had intermarried with Caleb Cartwright; Emily, the devisee mentioned in the second clause of the will above recited, who, after the death of the testator, intermarried with Ambrose W. Banks, and died in the life-time of the widow, leaving issue born in 1851 that died in 1852; and the plaintiffs in this suit. Besides these, his children, the testator left surviving him four grand-children, to wit: Wilson Reed and Elizabeth Reed, children of a deceased daughter, Milly; Margaret Ann Brothers, a daughter of Sarah Ann Brothers another deceased daughter of the testator; and Pernina Brothers, a daughter of a third deceased daughter.

Administration on the estate of Emily was granted to Banks, her husband.

Margaret Ann, the daughter of Sarah Ann, died in the month of March, 1852, unmarried, and without issue, or brother, or sister, or the issue of such, leaving her father, Harvey Brothers, surviving her. Administration on her estate was taken by G. D. Pool.

Pernina, the daughter of Susan, died very young, without issue, or brother, or sister, or the issue of such, leaving her father, George W. Brothers, surviving her. Administration on her estate was also taken by G. D. Pool.

The plaintiffs allege, in their bill, that they have made sale of one-half of the balance of the land mentioned in the seventh clause of the will, after laying off the twenty-five

acres to C. W. Brothers; reserving one other half of this balance for the devisee Margaret Ann.

They also allege that since the death of the testator's widow, Nancy, they have made sale of the land mentioned in the second clause of the will, and have the proceeds in their hands ready for distribution.

The plaintiffs allege that opposite and conflicting claims are set up to the fund; the administrators of Emily, Margaret Ann and Pernina, insisting that the fund in question, is to be regarded as personalty, and that they are entitled to one-seventh each; while Cartwright and his wife, Banks, Wilson Reed, and Elizabeth Reed claim that the fund is still to be considered as realty, or was so to be considered up to the times of making the sales, and that the shares of Pernina, mentioned in both clauses, descended to her heirs-at-law, both sales having been made after her death. The plaintiffs claim, that by the death of Margaret Ann and Emily, except the life estate which the said Ambrose took by the curtesy, their interests descended to them, and to the said Caleb Cartwright and wife, and to Wilson and Elizabeth, who represent their deceased mother, Milly. They say further, that Cartwright and wife, and Wilson and Elizabeth Reed claim, that the proceeds of the land, mentioned in the second clause, are to be distributed among such of the testator's children, and grand-children, as were living at the death of the testator's widow, which took place in May, 1852. Again, they state that Harvey Brothers and G. W. Brothers claim a life estate in the parts of the said fund which their daughters, Margaret Ann and Pernina, were entitled to: they state further, that as to the land mentioned in the seventh clause, it was contended that they should have sold all the remainder of the tract mentioned, after laying off the twenty-five acres to C. W. Brothers, whereas, they had only sold half of the remainder, believing that the other half of that remainder was devised to Margaret Ann.

The prayer of the bill is, that the Court will advise them as to the true intent and meaning of the said several provis-

ions, and direct them in the discharge of their duty in regard to these contradictory and conflicting claims.

The several persons above mentioned as having interests, were made parties defendant, who answered the bill admitting the statements of fact, as contained in the bill, but insisting on their several views as set forth in the plaintiffs' bill.

The cause was set down upon the bill, answer, and exhibit, and sent to this Court.

Smith, for the plaintiffs.
Pool, for the defendants.

Battle, J. The pleadings present for construction two only, of the clauses in the will of the plaintiffs' testator, Miles Brothers. The difficulties suggested in ascertaining the meaning of these clauses may be easily solved by reference to two or three adjudications of this Court.

The land directed to be sold by the second clause became personal estate at the death of the testator's widow, when the sale was to be made. *Croom* v. *Herring*, 4 Hawks Rep. 393. Adams' Eq. 136. The division of the proceeds was then to take place, and it must be among those of his children who were then living, and the heirs of those who had died, either before the testator or after his death, and before the death of his widow. By *heirs*, as applied to a bequest of personal estate, it is settled that those are to take who are entitled according to the provisions of the statute of distributions; *Croom* v. *Herring*, *ubi supra*. *Freeman* v. *Knight*, 2 Ire. Eq. Rep. 72. In the events which have occurred, the husbands respectively of the testator's deceased daughters, Sarah Ann and Susan, are entitled, instead of the administrator of *their* respective daughters Margaret Ann and Pernina, who died intestate and without issue, before the period of division. Indeed had the latter been living at that time, their fathers would have been entitled as representatives of their deceased wives. The children of Milly Reed, another deceased daughter of the testator, take their mother's share *per stirpes*.

There can be no doubt that the executors construed the seventh clause aright, in deciding to sell one-half of the remainder of the land mentioned, after setting apart twenty-five acres for C. W. Brothers. The proceeds of that sale were personal estate from the death of the testator, because the sale was directed to be made immediately, and the division was to take place at the same time. Hence we are to enquire who were his heirs? that is, who were entitled to claim from him under the statute of distributions, at the time of his death? These were his children, and his grand-children who represented their deceased mothers *per stirpes*. As two of the grand-children died after the testator their shares will go to their personal representatives. The children of Milly Reed, deceased, can claim in this, as in the other fund, only their mother's share.

The difference in the distribution of the two funds arises, as it will be perceived, from the fact that the first was to be divided, at the death of the testator's widow, among the testator's children who might be then living, and the *heirs* (that is, those who might be entitled to take under the statute of distributions) of such of his children as were then dead; and the second was to be divided, at the testator's death, *among all his own heirs:* that is, among those who were then entitled to take under the statute from him.

PER CURIAM. Decree accordingly.

THOMAS S. HASSELL *against* W. W. GRIFFIN, ADM'R.

A Court of Equity, in this State, will not interfere to prevent the administrator of a deceased member of a firm from retaining, out of the individual assets of his intestate, satisfaction for a debt due him from the firm.

APPEAL from the Court of Equity of Washington county, from an interlocutory decree of his Honor, Judge PERSON, dissolving the injunction previously obtained.

The case made by the pleadings appears from the opinion of the Court.

Smith, for the plaintiff.
Heath, for the defendant.

Pearson, J. The plaintiff is an individual creditor of Isaac Casey. The defendant is his administrator. Casey and William Davis were co-partners, and as such were indebted to the defendant in a large sum: Davis, the surviving partner, has a large amount of the effects of the firm in his hands.

The question is, has the defendant, as administrator, a right to retain the assets received by him as the individual property of Casey, in payment of a debt due to him by "Casey and Davis," to the exclusion of the plaintiff's debt?

It is decided, *White* v. *Griffin*, 2 Jones' Rep. 3, that the administrator of a deceased partner may retain a debt due by the firm out of the individual assets of the intestate, as against an individual creditor in an action at law—by force of the provisions of the 89th and 90th sections of the 31st ch. of the Revised Statutes. We are unable to see any principle upon which a Court of Equity can interfere in behalf of an individual creditor and take from an administrator his right of retainer.

It is a settled doctrine of the Court of Equity in England, that the creditors of the firm are first to be paid out of the the effects of the firm, and the creditors of an individual, who is a member of the firm, are first to be paid out of the individual estate of such member—the excess of either fund going in aid of the other; on the ground that creditors of the firm are supposed to deal on the credit of the firm; and creditors of the individual members are supposed to deal on the credit of the indvidual, 4 Kent, 65, 1 Story Eq. sec. 676.

The supposition that a creditor of the firm deals on the credit of the firm, is made, because of the fact, that in the event of the death of a member of the firm, the creditor has no remedy at law, except against the surviving partner.

The supposition that a creditor of the individual member deals on the credit of the individual, is made because of the fact, that such creditor has but a qualified right to subject the effects of the firm to the payment of his debt: for, although, under an execution in his favor, the sheriff may levy upon and sell the property of the firm, yet the purchaser acquires only a right to the thing purchased, subject to a settlement of all accounts, which is, in effect, only the undefined interest of the debtor in the surplus, after the partnership debts are paid. It is true, that in Equity, a creditor of the firm is not restricted to his remedy against the survivor, but may seek redress against the individual assets of a deceased partner. Still, the redress given to him is subject to the preferred rights of the individual creditors, and these terms are imposed because he has no redress at law; and when he comes into Equity, as that Court acts upon the supposition that the credit was given to the firm effects, and that fund is liable to him in the first instance, he is only allowed to reach the *surplus* of the individual assets, which fund is considered liable in the first instance to the individual creditors.

Our Statute, ch. 31, secs. 89, 90, 91, introduces a new order of things. A debt of the firm is *joint* and *several*. In case of the death of a partner, an *action at law* may be brought against his personal representative *alone*, or in connection with the surviving partner. This works an entire change, so far as creditors of the firm are concerned, and takes away the ground upon which the supposition, that a creditor of the firm deals on the credit of the firm, is based; because it gives him a direct remedy at law against each member of the firm and their personal representatives.

So, according to our law, a creditor of the firm is under no necessity of coming into Equity, and of course the Court of Equity has no right to impose any terms upon him; and it is also a matter of course, that a Court of Equity cannot, at the instance of an individual creditor, interfere and direct that the two funds should be applied, the one to pay firm debts in the first instance, and the other to pay individual debts in the

first instance, and the surplus of either fund to come in aid; for the plain reason, that by the force and effect of the statute, a creditor of the firm is made to all intents and purposes, an *individual creditor of each member of the firm.*

It being the pleasure of the makers of our law to put the creditor of a firm upon the footing both of a creditor of the firm, and of a creditor of each and every one of the members of the firm, the English doctrine can have no application; for, the very ground upon which it is built is taken away; and a creditor of a firm, under our law, must be supposed to deal, as well upon the credit of each member of the firm, as of that of the firm, because he has a direct legal remedy against each and all of them.

PER CURIAM. Bill dismissed.

JOHN C. CARROLL AND OTHERS *against* JOSIAH W. JOHNSTON AND OTHERS.

Where equities are equal in point of merit, and the junior equity in point of time gets the legal estate, a Court of Equity will not interfere in favor of the prior equity.

CAUSE removed from the Court of Equity of Sampson county.

Winslow, for plaintiffs.
Strange, for defendants.

NASH, C. J. This is a controversy between the creditors of Salmon Strong. The bill charges, that one Isaac Roberts being the owner of an improved lot in the town of Clinton, and seven acres of land, contracted with Salmon Strong to sell these pieces of land to him for the sum of two thousand dollars, and gave him a bond to make title when the purchase money should be paid. Salmon Strong being indebted to the companies of Johnston and Chesnut, and Hubbard and others, and being in failing circumstances, to secure the payment

of said debts, conveyed to the plaintiff Carroll, in trust, certain personal chattels, and also all his right, title and interest and estate in, and to the aforesaid improved lot in Clinton. This deed was executed and delivered on 17th of May, 1848, and was proved and registered.

The bill then charges, that the defendants had full, positive and explicit knowledge of this assignment, and full notice of the deed of trust. It then charges, that the defendants, by collusion with Salmon Strong, did procure from the said Isaac Roberts, a deed in fee simple to themselves, of the premises. This deed bears date 12th September, 1848. The plaintiffs then allege, that they offered to pay to the defendants the balance of the purchase money, and demanded a conveyance: or, if the defendants preferred, offered to release to them, upon the payment of the balance of the trust debts, which was declined. The bill prays that the defendants may be declared trustees for the plaintiffs, and that they may be compelled to a specific performance of the contract between Salmon Strong and Roberts, or to pay the claims of the plaintiffs.

The defendants answer, that they were merchants in the town of Clinton, and Salmon Strong owed them as such. Being in failing circumstances, in order to secure what was then due, and to procure other supplies, he proposed to sell to them the improved lot in the town of Clinton, at the price of $1650, to be paid for by the defendants in what was due them, and they to pay the residue of the purchase money to Roberts, (he, the said Strong, having made several payments to Roberts,) and the remainder of the price agreed upon, they were to pay, by supplies, to the said Strong, as he might require. In pursuance of this agreement, the bond of Isaac Roberts was surrendered to the defendants, and they went on to make advancements to Strong down to May, 1848, when, hearing that a deed of trust had been made by Strong to the plaintiff Carroll, for the benefit of the plaintiffs, they called upon Carroll to ascertain the fact, when they were told by him "if anything of the kind existed it was upon record."

The said conveyance was not registered until the 4th day of July, 1848. The answers further allege, that the defendants paid to Isaac Roberts the sum of $1215, being the balance due him from Strong, and took a conveyance from him of the improved lot. The defendants further allege, that it was part of the agreement between them and Strong that Josiah Johnston, one of the defendants, should become a surety for him in a note to one Faison for $90, which was done: defendants deny all knowledge of the conveyance to the plaintiff Carroll, until it was registered.

If the plaintiffs had, as they ought to have done, placed their deed to Carroll upon the register's book, at the time it was executed, the case would simply have been one of a double trust, and if any unnecessary delay had taken place in the plaintiff Carroll's not closing his trust, the defendants would have had a right to hasten him, as they would, in that case have had a clear interest in whatever remained after discharging the Carroll trust. The plaintiffs' trust was not registered until the 4th day of July, 1848. Deeds of trust and mortgages take effect, as against creditors, only from their registration: Rev. Stat. ch. 37, sec. 24. The defendants deny all knowledge of the Carroll deed until July 4th, when its registration was notice to all the world. Prior to this time, however, Strong had contracted debts with the defendants, and the agreement set forth in the answer was entered into. The defendants, under their agreement with Strong, supplied him with such articles as he required, and also paid the balance due from Strong to Roberts. The plaintiffs, by their deed, acquire nothing but an equitable right, the legal title being in Roberts. By their agreement with Strong, made while in ignorance of the equity of plaintiffs, the defendants acquired an equitable interest in the property in dispute, quite equal to that of the plaintiffs. In *Baggarly* v. *Gaither*, 2 Jones' Eq. Rep. 80, it is declared by the Court that a party so situated may protect himself by procuring the legal title: that "the latter purchaser, or incumbrancer, on payment of his money becomes an honest claimant in Equity, and is entitled,

if he can, to protect his claim"—Adams 330. That case decides the present: the defendants had a right to clothe themselves with the legal title. The equities being equal, this Court will not interfere.

PER CURIAM. The bill is dismissed.

G. HAIRSTON AND OTHERS, *against* RUTH S. HAIRSTON AND OTHERS.

A resident of this State, by his will, bequeathed to A, the wife of B, certain slaves and other personal property, and appointed B and his wife executors. B and his wife were residents of another State, and though B caused the will to be proved, he did not give the bond required by the law of this State, to entitle a non-resident to letters testamentary, nor obtain such letters, but took possession of the property bequeathed to his wife, and after using it as his own for nearly twenty years, died, leaving his wife surviving:

Held—that by this possession and use, the property did not vest in him, as husband, but belonged to his surviving wife.

Whether he was entitled to the profits received and used by him—*Quere?*

What is the effect of an assent to a legacy, by a non-resident executor, who dies without qualification—*Quere?*

CAUSE removed from the Court of Equity of Stokes county.

Morehead, for the plaintiffs.
Badger, *Gilmer* and *Ruffin*, for the defendants.

PEARSON, J. Robert Hairston died in March, 1852, intestate, leaving him surviving, his widow, Ruth, and his brothers and the children of deceased brothers and sisters, who are his next of kin. At September term, 1852, of the Court of Pleas and Quarter Sessions, for the county of Stokes, the widow Ruth was appointed administrator of the said Robert.

The bill is filed by some of the next of kin against the administratrix and the other next of kin, for an account and settlement of the estate.

Among other things, the bill charges that *Peter Hairston* died in 1832, leaving a last will and testament by which he bequeathed to his daughter Ruth, who was the wife of the intestate Robert, several valuable plantations in the county of Stokes, and also some seven or eight hundred slaves, together with much valuable stock, &c., upon the several plantations; that Robert Hairston took possession of these plantations, the slaves, stock, &c., and received and enjoyed the profits thereof: that about the year 1841, the said Robert went to the State of Mississippi, settled a plantation, and remained there most of his time, but without intending, or in fact changing his domicil, which was in the State of Virginia: that between the years 1841 and 1852, the profits of the plantations, slaves, &c., in the county of Stokes, were received by his brother, Samuel Hairston for, and on account of, the said Robert, and after his death were paid over to the defendant Ruth, as his administratrix.

The plaintiffs insist that the said slaves, stock, &c., bequeathed to the defendant, Ruth, by her father, Peter Hairston, were reduced into possession by Robert Hairston, and became his property *jure mariti*, and form a part of his estate, to be accounted for by the defendant Ruth, his administratrix.

They also insist that the profits of the plantations in Stokes county, between the years 1841 and 1852, which were received by Samuel Hairston for, and on account of, Robert Hairston, and paid over to the defendant Ruth, after the death of the said Robert, form a part of his estate to be accounted for by the defendant, Ruth, his administratrix.

The answers admit the devise and bequest of Peter Hairston, but the defendant Ruth alleges that she is entitled to the slaves, stock, &c., in her own right, because the legacy to her was a *chose in action*, which her husband had not reduced into possession.

She also, on the same ground, insists that she is entitled, in her own right, to the profits of the plantations, slaves, &c., from 1841 to 1852, and is not liable to account therefor as administratrix.

In support of her claim, she alleges that her father, by his will, appointed herself, her husband, Agnes Hairston and Samuel Hairston, his executors, and the will was duly admitted to probate; but no one of the executors qualified; on the contrary, they all declined doing so, and they all *resided beyond the limits of this State*, so that they could not, according to law, qualify, and take out letters testamentary, without giving *bond and security*. So she insists that her husband had not reduced the legacy, given to her by her father's will, into possession, and that she, as administratrix, is not liable to account therefor, or for the profits thereof, which, being an incident, must follow the principal: that after the death of her husband, she gave the *bond and security* required by law, and qualified as the executrix of her father's will, and then assented to the legacy, which she now claims to hold in her own right.

The bill, by way of anticipation, admits that the executors of Peter Hairston were all non-residents, and avers that they caused the will to be duly proven, and "agreed, among themselves, that as the estate was not at all in debt, and they were the principal legatees, it was useless to take out letters testamentary, and the devisees and legatees, under the will, should take possession of their respective estates, and have, hold, possess and enjoy the same, in as full and ample a manner as if letters testamentary had been taken out."

The defendant, Ruth Hairston, is the administratrix, and the plaintiffs and the other defendants are the next of kin, so, a decretal order for an account is a matter of course. It is held, *Dozier* v. *Sprouse*, 1 Jones' Eq. 154, that when, from the *relation* of the parties, a decree for an account is a matter of course, the rule is, "a matter of charge, *i. e.* what does or does not form a part of the fund, or of discharge, cannot be gone into at this stage of the proceeding, and comes up regularly by exception to the report of the master."

In that case the plaintiff had no counsel in Court, and although the defendant's counsel urged for a declaration of the facts and of the opinion of the Court thereon, upon a matter

that the bill alleged properly formed a part of the fund, because such previous declaration would save much trouble before the master, yet the Court refused to make any declaration as to the fact, or to give any opinion as to the law—acting upon the rule stated above.

In this case both parties have counsel in this Court, and the counsel on both sides ask for a decision of the two questions set out, not only because it may save much trouble before the master, but because it may stop all further litigation, as the parties may come to an understanding in regard to the other matters.

Yielding to these suggestions, we heard full arguments upon the first point and will now decide it.

Without saying whether an executor, resident in this State, can assent to a legacy, so as to vest the title in the legatee before he qualifies as executor, or, what legal effect can be given to the assent of an executor who dies before he qualifies, the question before us is settled by the fact that all of the executors were non-residents, and no one of them gave the bond required by law, or qualified in the lifetime of the intestate Robert Hairston, so that there was not, and could not be, an assent to the legacy of the wife, in the lifetime of her husband.

Rev. Statutes, ch. 46, sec. 6.—An executor residing out of this State is required to give bond and security, &c., "*and until the said executor shall enter into such bond, he shall have no power or authority to interneddle with the estate*, and the Court shall proceed to grant letters of administration with the will annexed; to continue in force until the executor shall enter into bond as aforesaid," which he must do within one year after the death of the testator.

For the want of an assent, which no one of these executors had "power or authority" to give, being all non-residents, the legal title to the slaves, stock, &c., did not vest in the intestate Robert Hairston, and it became vested in his widow Ruth Hairston, in her own right, after the death of her husband, when she qualified as the executrix of her father and then assented to the legacy.

Mr. Morehead, for the plaintiffs, insisted, that admitting there was not, and could not be, an assent, under the circumstances, in the lifetime of the intestate, still the intestate did *in fact* reduce the property into possession, and in this way, as between himself and his wife, the property became his *jure mariti*.

The rule that in order to vest the property in the husband *jure mariti*, he must reduce the wife's *choses in action* into possession, does not mean merely that he should get hold of the property and have it *de facto* in his possession; but that he should convert what was before a *chose in action* into a *chose* (or thing) *in possession*, by acquiring the legal title, and putting an end to all further ground of controversy, so as to make it a thing in possession; and then the law vests it in him as husband.

The fact, that a husband by taking actual seizin of land, is entitled after the death of the wife, as against her heirs, to an estate as tenant by the curtesy, notwithstanding the title may be in a third person, has no bearing upon the question. The law in regard to curtesy is derived from the feudal system; the law as to a husband's rights in his wife's choses in possession and her choses in action is derived from the civil law: so the sources are different; and it is well settled that in the event of the wife's surviving, she is entitled to all her choses in action, which her husband had not, during the coverture, reduced into a chose in possession, which purpose is not effected by his taking possession *de facto*. In our case, the wife had a chose in action, to wit, the legacy; the title of the property was in the executors, and it remained there, until after the death of the husband; so he did not, within the meaning of the rule, "reduce the chose in action into possession," and his wife, surviving him, is entitled, in her own right, to the slaves, stock, &c.

The second question, in regard to the profits of the plantation, slaves, &c., from 1841 to 1852, was not fully argued; for Mr. *Morehead* and Mr. *Badger* directed their arguments almost entirely to the first question, as the great and absorb-

ing matter; for this reason, we will not decide the second question until it comes up by exception to the master's report. It may be well to say however, that we incline to the opinion, that Robert Hairston was entitled to those profits which were received, for and on his account, by Samuel Hairston, acting as his agent. On the one hand it is said, the profits must go with the property as an incident follows the principal; but on the other it is said, that as to the profits of the land, the husband was clearly entitled, and the wife, in respect thereto, can set up no claim; and the profits of the slaves, stock, &c., were so mixed up and confounded with those derived from the land, that a separation is impossible; and that although the husband may not have acquired the legal title, so as to exclude the wife's right to the property itself, not having reduced the wife's choses in action into possession, yet, the profits being actually received by him are to be looked on as *fruit fallen*, or rent accrued upon a term of years, which passes to the wife as survivor, but the rent accrued belongs to the husband. There is much force in this view of the subject.

There must be a decree for an account, with a declaration of opinion, that the slaves, stock, &c., do not constitute a part of the estate of the intestate.

PER CURIAM. Decree accordingly.

MORRIS ROBERTS *against* ELIZABETH ROBERTS AND OTHERS.

A widow takes possession of a part of the land of her deceased husband, having had it assigned for her dower by some of the heirs, the others being out of the State and neither agreeing to or dissenting from this arrangement, and afterwards has most of it regularly laid off by court, though some, that was first occupied by her, is not finally assigned in her dower—it was *held*, that she was not liable to account to the heirs for the profits received from any part of this land.

A brother who leaves the State, cannot, when it suits him to file a bill for partition, require those of his brothers who have occupied parcels of the

land, to pay him a ratable part of the sum for which the parcels might have been rented. The parcels occupied not being more than a ratable part of the whole tract.

Cause removed to this Court from the Court of Equity of Cleaveland county, at Spring Term, 1846.

Moore, for plaintiff.

Winston, for defendants.

Pearson, J. Thomas Roberts died in 1841, intestate, leaving a widow and *eleven* children him surviving. The bill was filed in 1843 by Morris Roberts, one of the children, against the widow and the other ten children, praying for a sale of a tract of some 550 acres of land, which had descended to the children as his heirs-at-law, and in which the widow was entitled to dower. The bill also prays that the widow, and those of the children who had occupied portions of the land, should be decreed to account for the rent of the parts occupied. The land has been long since sold under a decree for the purpose of partition, but a decree in regard to the question of the rents has not been made, and the cause has never been brought on for final hearing until the present time. This delay is in a great measure to be ascribed to the fact, that the progress of the cause has been embarrassed, and much confusion produced, by overlooking the distinction between an interlocutory order for an account, in which the Court declares that the plaintiff is entitled to an account, and the matter is *adjudicated* in regard to that; and a mere order of reference, for the sake of having certain matters of fact ascertained by the master, as preliminary and necessary to enable the Court to declare an opinion in regard to the liability of the defendant. A reference of this kind is not an adjudication, and is made merely for obtaining such further information as the Court may suppose it stands in need of before a decision can be made.

In regard to the widow, the former orders in the cause are of this latter kind, and the Court now, for the first time, is

called upon for a declaration as to the right of the plaintiff against her.

It is clear that the defendant, Elizabeth, is not liable to account for the rent of the 50 acre tract; it was a part of the tract that descended to her and others upon the death of her father; in order to make partition it was divided off into lots, and the several heirs were allowed to bid for the lots; this lot, (to wit, the 50 acres) was bid off by Thomas Roberts, the husband of said Elizabeth, at some small sum over the average value; the other heirs conveyed to him upon payment of this small excess; so in fact he took the legal title for his wife, and she is the owner in equity, subject to the payment of the small amount paid by her husband, in order to carry out the peculiar mode of partition which was resorted to. Of course this land is put out of the present question.

The widow occupied the mansion house, and some part of the land, for several years after the death of her husband, when her dower was regularly assigned under an order of court; but, in the meantime, such of the children as lived in this State, had assigned dower to her, in the absence of the plaintiff, who had removed from the State. A part of the land which the widow had thus occupied and cultivated, is not included in the dower which was ultimately assigned to her, and the question is, can the plaintiff, by this bill, call upon her for an account of the rent of this part of the land? He can only do so upon the ground, that she was a tenant in common with him and occupied as such. This is evidently not the fact; because she took possession and occupied, claiming in severalty, and never, for one moment, admitted the relation of a tenancy in common. It may be the plaintiff might have treated her as a trespasser, but that gives no ground for an application to this Court for an account; in fact it is inconsistent with such an application, and most assuredly he cannot mix up such a claim with an application for an account against the defendants, who are tenants in common.

In regard to the children, the former orders are of both the kinds referred to above. The relation of tenants in common

being admitted, an account is an order of course, for the purpose of ascertaining what rent or benefit each had derived from the common fund. But it does not follow that upon the coming in of the report, the plaintiff is entitled to a decree for a ratable part of the amount charged against each: That depends upon whether any one has received more than his just share.

In *McPherson* v. *McPherson*, 11 Ired. 391, it is said "the mode of enjoyment is not material; it makes no difference whether he uses it merely for shelter or as a means of supporting himself and family, or makes money by selling the products, or receives money as rent: in either case he is bound to account with his fellows," "but no recovery can be had against him, unless, upon taking the account, it is shown that he has received more than his just share."

Several of the children, as they married off, had been allowed by the intestate to build cabins and clear small parcels of land, say five, ten, or twelve acres. After his death they continued to occupy these cabins, and extended the fields by enclosing some few acres more, as the purposes of firewood, rail-timber, &c., rendered necessary, but in no instance exceeding fourteen acres, including the clearing made in the intestate's lifetime. Some of the other children after the intestate's death lived with the widow, and some removed from the State; among the latter was the plaintiff. The question is, has the plaintiff a right in Equity to call upon his brothers who occupied these small parcels of the land, and require them to pay him a ratable part of what the houses and little fields could have been rented for? His brothers say that they did not occupy upon the idea that they would be charged with rent; the parcels they respectively occupied were not as much as the lot which, upon partition, would have been the share of each, and they left room enough for the plaintiff to come and live on the common patrimony, in the same way they were doing, and had been allowed by their father to do in his lifetime. They say further, if we are to be charged with rent, as tenants, we claim an allowance for building the

cabins and clearing the land. This last idea is put out of the question, because from the report of the commissioner, we are satisfied that the erection of these houses, and the clearing of these several "patches" did not enhance the value of the tract of land; on the contrary it is apparent that a purchaser of *the whole* would rather have had it all in woods, except the dwelling house and the 25 or 30 acres of cleared land around it; so the sole question is, has the plaintiff a right to charge the defendants with rent for the houses they lived in, and the land they cultivated, upon the facts set out?

We think the plaintiff has no such right. The learning upon this subject is taken from the English books, but we should bear in mind that in England almost all of a man's real estate is out upon rent, and the importance of a landed proprietor is estimated by his "rent roll:" of course, if one of his heirs should receive more of the rent than amounts to his share, he is liable to account and pay the excess to the other heirs. This doctrine is correctly laid down by Adams, 232. "In addition to the decree for partition, the Court may also, if either of the co-owners has been in the *exclusive perception of the rents*, decree an account of his receipts: but the mere fact of his having occupied the property, will not of itself make him liable for an occupation rent; for the effect of such a rule would be, that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff, and prevent him from occupying them except upon the terms of paying rent."

Any one will see the good sense of this in reference to the state of things in England, and in regard to the condition of things among us, he will be satisfied that no other doctrine would meet the exigency of the case and that with us the rule, if anything, should be more in favor of the tenant in common whose convenience or necessities induces him to occupy a part of the premises, being guilty of no ouster of his co-tenants, and leaving room for all of them. If one does not like this state of things, all he has to do is, to compel partition. Suppose some of the children live in the dwelling house of

the deceased parent, and are all the time willing and anxious for the others to come and live there also, but the others prefer to go off to Georgia or California, and after many years return; have they a right in equity, to treat their brethren as *bailiffs* or *servants* or to consider them as their tenants, occupying upon the terms of paying rent? Or suppose one dies, leaving an inexhaustible quarry of limestone, and a kiln which he had used, and left ready for further use, and an inexhaustible supply of wood-land; then if the children live near the place and at times, whenever the hands can be spared from their farms, get out rock, cut wood and burn a kiln, the other children having moved off so as not to be in a condition to make use of the limestone, but are fully aware that the others are willing for them do so, and there is time enough for all, if they chose to come to an agreement, and manage the matter in that way—to burn kilns each in his turn—but they do not choose to do so, and the matter is left without any arrangement or understanding among them, is there any principle of justice upon which the latter can demand, or expect that the former should be converted into bailiffs for them, and be made to account for every kiln of lime that they had from time to time burnt and sold, keeping no account thereof, because not conscious of being under an obligation to do so, and consequensly utterly unable to make out an account except upon "rough estimates," the question is, are they to be treated "as tenants occupying upon the terms of paying rent?"

Without going into an examination of the opinions of all the English Chancellors upon this subject, and without giving references to decided cases, all of which are referred to in the text books, we are content to declare our opinion to be, that a brother who leaves the State, cannot, when it suits him to file a bill for partition, require those of his brothers who have occupied parcels of the land to pay him a ratable part of the sum for which the parcels might have been rented: the parcels occupied not being more than a ratable part of the whole tract. We put our opinion upon the ground that there is no

express contract to that effect, and there is nothing from which either in law or equity such a contract can be implied.

If there is an actual ouster other considerations will be presented; but where there is no actual ouster (as in our case) the plaintiff can only support his claim by shewing that the defendants have received more than their just share. His claim depends upon the Statute of Anne, which gives him the right *if the others have received more than their share.*

It will be declared to be opinion of the Court that the bill be dismissed, with costs as to the defendant Elizabeth; and that the plaintiff, as to the other defendants, is not entitled to any decree in regard to the rents and profits of the land.

PER CURIAM. Decree accordingly.

ASHLEY SAUNDERS, EXECUTOR, *against* WM. E. EDWARDS AND OTHERS.

Where a trust estate is created by will, and a general plan laid down for the guidance of the trustee, wherein it is declared to be the purpose of the testatrix that the trust property *should be secured and settled upon three* DAUGHTERS *and their children respectively; "and the more effectually to carry into execution the will"* it gives the property to the trustee "to hold in trust for *the sole* use and benefit of the daughters and their heirs forever"—*Held*, that the trust, being executory, the plain intention of the testatrix should be carried out, by giving the separate use of the property to the wives for life, with a remainder to their children, as well those born in the lifetime of the testatrix, as those born afterwards.

CAUSE removed from the Court of Equity of Johnston county.

In the will of Elizabeth Jones are the following provisions: "As to my property, my will and desire is, that after my death, it may all be equally divided among my children, share and share alike, but in the distribution, it is my will and desire that the portions falling to my daughters Jane Boykin, Amanda Edwards, and Eugenia Blackwood, should be

secured and settled upon them, the said daughters and their children respectively: and the more effectively to carry into execution this my will and desire, in regard to the division that may fall to my daughters aforesaid, I give and bequeath such lots and divisions as may fall to them from the equal divisions of my property as aforesaid, unto my beloved friend Ashley Saunders to hold in trust for the sole use and benefit of them, my said daughters Jane, Amanda, and Eugenia, and their heirs forever, to him and his heirs in trust as aforesaid: and the more fully to administer and carry into effect this my will, I do hereby appoint Ashley Saunders and my son Willis W. Jones, as my executors to this my will."

Plaintiff Saunders qualified and received, on account of the three daughters, a sum of money amounting to about $820 each. He alleges in his bill, that he has thus far (up to November, 1854) paid to Eugenia Blackwood, regularly, the interest accruing on the sum held as hers—to Amanda Edwards interest on her share up to November, 1852, at which time she died. To Jane Boykin he has paid nothing, because she and her husband have refused to receive the interest alone without the principal, and still insist on receiving the latter.

Amanda, at her death, left four children surviving her, of whom three were born at the death of Elizabeth Jones the testatrix, and Jane, the daughter of said Elizabeth, at the filing of this bill had four children, of whom, three only were born at the death of the testatrix. Eugenia at the death of the testatrix, had five children, and now has seven: all of these children of the three daughters are infants, and are made parties defendant to the bill, and have answered by their guardians.

Administration was taken on the estate of Amanda Edwards by W. H. McCullers, and her representative made a party defendant also.

The husbands of the surviving daughters are likewise made parties defendant.

The bill states further, that there are conflicting claims set up to the property under the above disposition: the husbands

of the daughters insisting, that the property is left to their wives in absolute right, and that they are entitled to the shares that may be assigned to their wives respectively.

On the other hand the daughter Amanda, during her life, contended, and her administrator now contends, as do also the daughters Eugenia and Jane, that the said property was intended to be, and was in fact, conveyed in trust for their sole and separate use and benefit.

Another difficulty is suggested by the executor himself in behalf of the children of these daughters, and that is, whether the use of said property does not vest in the mothers for life only, and afterwards in their children?

And if this latter construction is to prevail, still another question arises, viz: whether the children who were *en esse* at the death of the testatrix, or whether all the children born of these three daughters are entitled?

The executor and trustee Saunders calls upon the defendants to litigate and settle these questions amongst themselves in this Court, and prays that he may be instructed what are the legal and equitable rights of the parties in the premises, and that he may be protected by a decree of this Court, in paying over the estate in his hands.

The answers of the husbands, Blackwood, Boykin, and Edwards, and the wives of the two former, and McCullers the administrator of Mrs. Edwards—also, the children of these defendants file their answers re-asserting the above contradictory claims, and upon the facts set out in the plaintiff's bill pray, severally, that the Court may decree according to right and equity in their behalf.

The cause was set down for hearing upon the bill, answers, and exhibit, and sent to this Court.

Miller, for plaintiff.
G. W. Haywood and *Husted*, for defendants.

Battle, J. The trusts created by this will of the plaintiff's testatrix, are manifestly such as are called executory, in con-

tradistinction to trusts executed. The difference between them is, that the first merely declares a general plan or outline, to be carried out in detail, by the trustee, according to the apparent intention of the creator of the trust; while the second is a final and complete declaration, by the person raising the trust, of what it is, and leaving nothing to be done by the trustee to define and settle it. The first is construed more liberally, and less subject to the legal signification of technical terms than the other, as will be abundantly seen in Fearne and all the other elementary writers who discuss and explain the celebrated rule in Shelly's case. Here the testatrix states in express terms, that her purpose, in raising the trust, is to provide a fund for the sole use and benefit of her married daughters and their children. That purpose is a proper one, and can be made effectual only by giving estates for the sole and separate use of the daughters respectively for life, with remainder for their children. This will of course embrace all the children, which the daughters may have during their lives. It follows as a necessary consequence that the husbands are not entitled to the principal of the fund, and that the trustee acted right in paying the interest, only, to the wives. A decree may be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

WILLIAM E. SHIVER AND ANOTHER *against* DANIEL S. BROCK AND OTHERS.

Where an intestate had put slaves into the possession of his child, and afterwards made a deed of gift of them, the advancement must take effect and be estimated as of the date of the deed, and not of the commencement of the possession.

Property put into the possession of a child on his setting out in life, suitable to house-keeping and family purposes, is not to be considered as a present but as an advancement.

Property given to grand-children is not liable to be brought into hotchpot.

Carey removed from the Court of Equity of Jones county.

The bill was filed by William E. Shiver and Hannah his wife, and by John M. Parsons, who are the grand-children of Martin F. Brock, dec'd., against Daniel S. Brock, his administrator, and against Edmund H. Brock, Mary F. Konegay (since married to Massillon) Eliza Jane Brock, Susan C. Brock, and James Brock, who are the children and (with the plaintiffs) the next of kin and heirs-at-law of the intestate, also against Zaccheus Smith who is the administrator of another daughter now dead.

The bill claims for the plaintiffs one-sixteenth of the estate, being the eighth part, to which their mother, Elizabeth Parsons, would have been entitled had she survived, and alleges that the other children, seven in number, would have been entitled to one-eighth each, only; that several of them, particularly the defendant Daniel, had been advanced in land, slaves, and other property, in the lifetime of the intestate. The only questions urged upon the consideration of this Court are respecting these advancements, and certain other advancements, which the defendants allege were made by the intestate to the plaintiffs.

The cause was referred to the clerk and master to state the account, and on the coming in of the report the defendants and plaintiffs both filed exceptions. These exceptions raise the questions submitted:

DEFENDANTS' FIRST EXCEPTION.

In his report the master charged the defendant Daniel with the value of three slaves, Simon, Plutus, and Green: The mother of these slaves, Leah, had been put into the possession of the defendant Daniel, in 1841, and the children were born after that time. In 1847 the intestate made a deed of gift of Leah and the three children to this defendant, and it was contended by him that the advancement must take effect as of the time when Leah was first put into his possession and consequently that the children born after that date were his own property, and not liable to be brought into hotchpot: but the master, considering the advancement to take effect from the

date of the deed of gift, set down the value of the whole four, as a charge against him. This is the ground of the defendant's first exception.

DEFENDANT'S SECOND EXCEPTION.

The intestate, several years before his death, had put into the possession of his son Daniel, the following property, to wit: a horse, some cows and hogs, a bed, some chairs, a table, some bacon, corn and lard, amounting in value to $299: it was insisted by him that these articles were intended as presents, and ought not to form a charge against him, and being so charged, the defendant Daniel made it the ground of exception.

DEFENDANT'S THIRD EXCEPTION.

The intestate, in his lifetime, had given the defendant Daniel a deed for two tracts of land, and upon a petition, in the County Court of Jones, for a partition of the lands of the intestate, this defendant had refused to bring his advancement into hotchpot: it appearing that the lands thus advanced were greater in value than what he would have taken by descent, it was insisted by the plaintiffs that that excess ought to be brought into the account, and deducted from his share of the personalty, which was accordingly done by the master: and this forms the ground of the third exception of the defendant Daniel; because, as he insisted, the real estate was advanced before the Act of 1844, ch. 51.

THE FIRST EXCEPTION BY THE PLAINTIFFS.

Two slaves, Lucy and Derry, had been put into the possession of Mrs. Parsons, on her marriage, and so remained during her life: after her death, the intestate made a deed of gift for these slaves to her children, the plaintiffs, and they insisted that this advancement ought not to be charged against them: the master having allowed it as a charge, the plaintiffs make it the ground of exception.

PLAINTIFFS' SECOND EXCEPTION.

Several articles, to wit: horses, cattle, sheep, and one bed, were given to the mother of the plaintiffs by her father, the

intestate, on her going to house-keeping, and it was insisted that, from their nature, these were intended as presents, and ought not to be charged against them. The master made the charge however, and the plaintiffs except on this account.

The cause was set down for hearing on the bill, answers, exhibits, the report and exceptions, and former orders, and transmitted to this Court.

J. W. Bryan, for plaintiffs.
No Counsel for the defendants.

NASH, C. J. The bill is filed for an account and partition, and on the hearing, an account was ordered. The master made his report and each party filed his exceptions.

The exceptions of the defendant are all over-ruled.

The first exception: because, although the mother of the slaves Simon, Plutus, and Green, had been put into the possession of the defendant, yet his possession had not ripened into an advancement: for before the death of the intestate, the defendant accepted from him a deed of conveyance, both for the mother and her children. *Hill* v. *Hughes*, 1 Dev. and Bat. 336, *Hicks* v. *Forrest*, 6 Ired. Eq. 528, and the slaves are to be considered an advancement from the date of the deed.

The second exception is over-ruled. The articles furnished him, were so furnished him on setting out in life, and were necessary for his plantation and advancement. *Meadows* and *Meadows*, 11 Ired. 148. 2 Williams on Ex. 923.

The third exception is over-ruled. By the Act of 1844, the real and personal estate are made one fund in respect to advancements; the defendant can claim no portion of the slaves without accounting for the land, as the Act operates upon the partition. *Headen* v. *Headen*, 7 Ired. Eq. 159.

The first exception of the plaintiff is sustained. The slaves, Lucy and Derry, were by the intestate given to the grand-children by deed. The grand-children are not entitled to a distributive share in their own right, but as representing their

parent; the gift to them is not an advancement, and is not to be brought by them into hotch-pot. *Headen* v. *Headen*, 7 Ired. Eq. 159. *Daves* v. *Haywood*, 1 Jones' Eq. 253.

The second exception is over-ruled, for the reason assigned for over-ruling the second exception of the defendant.

The report is confirmed in all things, except to the plaintiff's first exception and the matter is referred to the master, to be reformed agreeably to this opinion.

PER CURIAM. Decree accordingly.

RICHARD S. TAYLOR AND OTHERS *against* THE COMMISSIONERS OF NEWBERNE.

An Act of the Legislature authorising the commissioners of an incorporated town to subscribe to the stock of a company incorporated for the purpose of improving the navigation of a river contiguous to such town, is not forbidden by the constitution.

It does not make a difference that the improvement contemplated by the Act is to begin several miles above the town, and to pass through several other counties than the one in which the town is situated.

Nor does the constitution forbid the Legislature to pass a law, authorising such commissioners to make their bonds, to meet such stock subscription, and to levy a tax to pay the principal and interest thereof.

APPEAL from the Court of Equity of Craven county.

Upon the argument of the demurrer in the Court below, his Honor over-ruled the demurrer, and ordered the defendants to answer. He further adjudged that the writ of injunction prayed for, be issued. From which decrees the defendants prayed an appeal, which the Court allowed.

The cause was argued at the last term of the Court by *Donnell*, for the defendants.

The decision of the cause was postponed for an argument on the other side; at this term it was argued by *Moore*, for the plaintiffs.

NASH, C. J. The question in this case arises, under the private Act of 1852, ch. 2, sec. 5, whereby the commissioners of Newberne were authorised to subscribe for five hundred shares in the Neuse River Navigation Company, for the use of the town. The commissioners, under the authority thus conferred, made the subscription, and under the authority of the same Act, executed their bonds for the amount so subscribed for, and proceeded to levy a tax upon the citizens of Newberne who were freeholders in the town, to pay the interest upon their bonds, and for their ultimate discharge.

The plaintiff who is one of the real-property-holders in the town, and a corporator, filed this bill to enjoin the collection of the tax imposed by the commissioners; upon the ground that the Act of 1852 was unconstitutional; and if constitutional, was never accepted by the corporators. The defendants demurred.

Upon opening the case at the last term, an able and interesting argument in support of the demurrer was addressed to us. No counsel appeared on the part of the plaintiff. The principle involved was too important to be decided without a full argument. The plaintiff had no right to throw such a question before us and leave us without the aid of counsel. He is now represented, and much time and labor are spared us.

The counsel for the plaintiff having satisfied himself, as a constitutional lawyer, upon the principle chiefly litigated, has not sought to envelope the case in doubt and uncertainty, which his own strong mind did not entertain, but has abandoned the constitutional question, admitting the power of the legislature to pass the Act as too strongly fortified, both by authority and reason, to be now doubted. He brought before us most of the coses which have been decided in the different States of the Union. We have considered these authorities with care, and find that they uniformly decide the question in favor of the constitutional power of the legislature to pass such an Act. In Tennessee, Ohio, Virginia, Pennsylvania and Massachusetts, such has been the result. See the case of the *Louisville and Nashville R. R. Co.* against *the County*

Court of Davidson county, in Tennessee; of *Griffiths and others* against *the Commissioners of Crawford county and others*, in Ohio; that of *Goodin* v. *Crump*, in Virginia, 8 Leigh's Rep. 120; the case reported in the February number, 1854, of Livingston's Law Journal, from Pennsylvania, and that of *Adams* and *Howe*, 14 Mass. Rep. 345. However these may differ from the one before us in some particulars, they all concur in the leading principle of the constitutional power in the legislature to authorise such a subscription. Many other cases are referred to in the argument of the defendants' counsel: we deem the above sufficient for our purpose.

In the very able opinion of Chief-Justice Hitchcock, of the Supreme Court of Ohio, filed in the case of *Griffiths and others* against *the Commissioners of Crawford county and others*, to be found in the appendix to the 20th vol. of Ohio Reports, all the cases on the subject are cited and commented on, and he decides in favor of the constitutional power, and he remarks, "if decided cases are to have any influence, they (those he had cited) are sufficient. These cases all sustain the proposition that the legislature has the constitutional power to authorise municipal corporations to subscribe for rail-road stock, though not passing through or terminating in the town, or in its immediate neighborhood." As this principle has been conceded, we deem it unnecessary to enter into an elaborate investigation of the cases cited; but resting on those cases, we are of opinion that the Act of 1852 is within the constitutional power of the Legislature.

Passing by this point then, as settled, we will proceed to notice the ground upon which the argument of the counsel of the plaintiff is rested. He insists that the Act of 1852 is an amendment of the charter of the town of Newberne, and is inoperative until accepted by the corporation, which has never been done. The town of Newberne was incorporated in the year 1723, with the usual corporate powers. An amendatory Act passed in 1779, and by the 13th sec. it is enacted "that the *Commissioners* of the town of Newberne shall be and

hereby are incorporated into a body politic and corporate by the name of the commissioners of Newberne, and by that name have annual succession, &c., and a common seal." The Act of 1852 enlarges the power of the commissioners, so as to enable them to subscribe for five hundred shares in the Neuse River Navigation Company. By the first section it is enacted "that it shall and may be lawful for the commissioners of the town of Newberne, and they are hereby authorised and empowered to subscribe for five hundred shares of the capital stock of the Neuse River Navigation Company, to be held by the commissioners of the town of Newberne, for the use and benefit of said town." The second section authorises the commissioners "to make, execute and deliver their bonds for the payment of such sums of money, &c., with the *corporate seal of the commissioners aforesaid.*" The fifth section enacts; "that to provide for the payment of the bonds issued by virtue of the provisions of this Act, and to provide for the payment of the interest accruing on the same, it shall be lawful for the *commissioners* of the town of Newberne, and they are hereby authorised and empowered, and required, from year to year, and every year, to assess, levy and collect from the real estate within the limits of the town of Newberne such an amount of taxes, &c., as shall be necessary, &c."

The power to make this subscription did not exist in the corporation of Newberne, by force of the original charter, or by any of the intermediate acts amendatory of it; it required legislative aid to enable them to do so, and by the private Act of 1852 it was, that the power was conferred. Whether the legislature acted wisely or not, is a question with which we have nothing to do. The power being admitted, its abuse cannot affect it; that must be for the legislative consideration. It is sufficient that the Judiciary claim to sit in judgment upon the constitutional power of the legislature to act in a given case; it would be rank usurpation for us to enquire into the wisdom or propriety of their acts.

It is admitted that this being a political corporation, the Legislature acting within the pale of their constitutional pow-

ers, may command an act to be done, by the commissioners, which would be imperative upon them and be enforced through the action of the Judiciary, and that this Act is not of that character but is permissive. In passing this Act, the Legislature appears to have been perfectly aware of this distinction.

In the first clause, which confers on the commissioners this new power, the language is, "it shall and may be lawful, &c." Whether the subscription should be made, is left to the discretion of the commissioners, acting for the corporators, or to the corporators themselves. But having made the subscription for the stock and given their bonds for the money to be paid, it is no longer left to the discretion of the commissioners or of the corporators to say whether they should be paid or not. Acting upon the wholesome principle that a public body should never incur a debt wihout at the same time providing the means for its discharge, the Legislature pass, in the fifth clause of the Act, from the *permissive* to the *injunctive*. The commissioners are not only authorised, but *required*, which in legislative language is equivalent to *commanded*, to levy a yearly tax, to pay the yearly accruing interest, and to provide a fund for the final discharge of the debt. After the contraction of the debt there is no discretion left in the commissioners or the corporators whether or not they will pay the bonds or the interest, in the hands of the holders, their payment would be enforced by the Courts by a *mandamus* commanding them to levy a tax for that purpose. *Hill* v. *Bonner*, Busb. 257. *State* v. *Justices of Moore*, 2 Ired. 430.

In admitting the constitutional power of the Legislature to pass the Act, it was conceded that they had a right to direct the commissioners as to the species of property out of which it should be raised. This is certainly true. By the constitution, the taxing power is vested in the Legislature; nor do we know any limit to that power, either as to the amount to be levied, or the subjects out of which it is to be raised. The whole property of the citizens of the State, when under no constitutional protection, be it what it may, is liable to be taxed, and at each session of the Legislature we see the ingenuity of

the members taxed to discover new sources of revenue. The exigencies of the State must be supplied—its obligations redeemed. With the power to authorise the subscription to the stock, was conferred the power to lay the tax necessary to redeem the obligations of the corporation, so incurred, and there was a manifest propriety in selecting the realty within the town as the source from which the fund was to be derived. *It* is the interest most to be promoted of any other in the town, by the proposed subscription. Situated as Newberne is, in the fork of Neuse and Trent Rivers, and cut off from nearly all communication with the interior of the State, except through the aid of the former, its improvement in every interest is manifestly connected with the improvement of the river Neuse, and it is a matter of little importance, in this view of the case, that the improvement will commence ten miles above the town. *Staples* v. *the Mayor*, &c., Livingston's Law Magazine, Feb. No., 1854. But, as before remarked, this is a question to be decided by those immediately interested, who are much more competent to decide it than we can be.

It was urged in the argument before us on the part of the plaintiff, that as this is a power in the Legislature susceptible of great abuse, when an acceptance by the corporation is necessary to give life to the Act, the Court ought to require the clearest evidence of such acceptance. This proposition, in the main, we accede to. Messrs. Angel and Ames, in their valuable work on corporations, 5. 83, in remarking upon an acceptance by a corporation, when it is necessary, say: "the question whether it has been accepted will of course in a measure depend upon the circumstances under which it was granted." In the case, *the Charles River Bridge* against *the Warren Bridge*, 7th Pickering, 344, it was held that where a grant was beneficial to a corporation, an acceptance may be presumed. It is not essential to the taking effect of a charter that the acceptance should appear on the records of the corporation.—*Russell* v. *McClelland*, 14 Pick. 53. The acceptance, for some purposes, may always be inferred from the exercise of corporate powers under it.—Angel and Ames, 75.

Let us now examine the case with those authorities in view.

The bill which contains the statement of the plaintiff is drawn in a manner highly creditable to the plaintiff and his draughtsman. There is no attempt to smother up or evade, or keep back the whole truth, but its statement is plain and to the purpose. It states, "that a short time before the session of the Legislature at which the said Act, to enlarge the powers of the commissioners of the town of Newberne, was passed, an election was held at the court-house in the town, after due advertisement of the time and place of holding said election and of the purposes of it, to take the sense of the owners of real estate in said town, whether they wished the Legislature to empower the commissioners of said town to take $50,000 worth of stock in said Neuse River Navigation Company, and that though there was a considerable majority of the votes polled, at such election, in favor of the Legislature's empowering the commissioners to make such subscription, yet there was a considerable minority vote against it." It then sets forth, "that in all elections of commissioners of Newberne since the passage of said Act, the question of the subscription aforesaid by the commissioners of Newberne was made a test question, and there was one set of candidates who were avowedly and notoriously opposed to the subscription, and another set of candidates avowedly and notoriously in favor of the subscription, and that all but one of the candidates so in favor of the subscription, were each year elected." It appears then, from the bill, that the Act of 1852 was not sprung upon the real-property-holders in the town of Newberne. They were notified that such an application would be made to the General Assembly at its next ensuing session, and they were called on to vote for, or against it. A majority did sanction the application. In two subsequent elections of commissioners of the town, the same question was submitted to the voters, and with the same results. It is alleged however, both in the bill and the argument here, that the first election was called by the commissioners without any authority from the Legislature to do so. Be it so. The important

point to ascertain, is, what were the views and wishes of the real-property-holders, and it is not a matter of very high importance how it is ascertained, provided it is ascertained satisfactorily. So, what was determined on by the voters at the first election was ratified and confirmed on two subsequent elections when the question was fairly brought before the electors of the town. In what other way could the sense of the corporators be ascertained? What other mode can be suggested, better calculated for the ascertainment of their wishes on the subject? Nor is it of any importance that the vote was not unanimous upon either of the occasions. The Legislature may incorporate a town or enlarge a charter previously granted, with the consent of a majority of the corporators, and if a number less than the whole will suffice, who is to decide upon the *plus* or *minus?* A charter accepted by a majority is binding upon all the corporators, so far as its validity is concerned.—*Goodin* v. *Crump*, 8th Leigh's Rep. 155. *Louisville and Nashville R. R. Co.* v. *the County Court of Davidson county*, Tennessee.

The Act of 1852 is silent as to the taking the sense of the corporators upon the acceptance of the charter. If it had directed the taking the sense of the corporators in any particular mode, it would have been necessary to its validity, that such mode should have been pursued; but failing to do so, that assent or acceptance may be gathered by the Court from any act or acts of the corporators, as such, which can satisfy it of the fact. Believing as we do that the Legislature had the constitutional right to pass the Act of 1852, and that it was accepted as an amended charter of the town of Newberne, by a majority of the corporators, we are of opinion that the demurrer be sustained and the bill dismissed.

Per Curiam. Decree accordingly.

RICHARD J. ASHE *against* JOHNSON'S ADM'R. AND OTHERS.

Where to a bill for a special injunction, the defendant, who is an administrator, in his answer makes a formal denial of the matters alleged "according to the best of his knowledge and belief," and also alleges new matter in reply to the plaintiff's equity, the Court will not dissolve an injunction previously ordered:

As, where a plaintiff alleges that the defendant was to take certain stock off his hands, whose administrator says he does not know as to the agreement, but suggests if it was so, plaintiff was to work in company with defendant's intestate, and was to be paid for such work not by intestate, but by the plaintiff's own labor.

Where one of two defendants has agreed to do a specific thing, for the benefit of the plaintiff, and the other defendant is the holder of a covenant under which it is to be done, also is the holder of the fund out of which compensation is to be made, and is about to part with the fund without making the compensation, the plaintiff has ground for going into a Court of Equity to restrain it from being put out of his hands.

Stocks in a recently chartered Rail Road Company, are to be viewed very differently from government stocks in England, which have a value in the markets of that country readily ascertainable.

APPEAL from the Court of Equity of Orange County from a decretal order dissolving an injunction.

Badger and *Phillips*, for the plaintiff.
J. H. Bryan, for the defendants.

PEARSON, J. For the purpose of inducing individuals to subscribe for the amount of stock necessary to secure the charter, the gentlemen who felt the deepest interest in the success of the enterprise, and to whose exertions the North Carolina rail-road owes its existence, in their speeches and in the conventions which they procured to meet, held out the assurance that the company, when organized, would take care to relieve the subscribers of their stock by requiring those who contracted to do work on the road, to take stock in payment of one half of the amount of the price of their work.

The company, at its first meeting, instructed the directors

to carry into effect the assurances which had been held out to the subscribers for stock, and in the language of the company in its answer, "the substance of these resolutions, passed at different times and conventions, was, that in letting out the contracts, the contractors were to be *required to take stock as far as it was practicable to get them to do so.*"

In pursuance of these instructions, the president and directors, in the advertisements for letting out contracts, made this stipulation; the contractors "receiving in payment on their contracts, *one-half in stock of the road*, the other half in cash."

At the letting of contracts in Hillsborough, Johnson, the intestate of the defendant Jones, proposed to contract for the grading and culverts upon sections 17, 18, 19, 20, of the second division of the road, taking in payment 40 shares which he had subscribed for, and 40 shares which William A. Graham had subscribed for; but he was informed that 80 shares would not equal one-half of the amount, and that according to the terms of the letting, he could not get the contract, unless he took more stock. Accordingly he entered into a contract which contains, among others, this clause, to wit, "one-half to be paid in cash, &c., the other half to be applied in payment of 40 shares of stock subscribed for by said Johnson; 40 ditto subscribed for by William A. Graham; 10 ditto which Graham takes for Edmund Strudwick, and the balance to be applied *to the payment of instalments due upon the stock of Richard Ashe, or so much as may be necessary to make, with the foregoing, one-half of the whole contract.*"

Johnson, with the assistance of Graham, who furnished a number of hands &c., completed his contract; and the amount to which he is entitled to be paid, according to the terms of his contract, is $24,000 (in round numbers.)

The plaintiff insists that one-half of this sum ($24,000) was to be paid in stock; and admitting $9,000 to be first applied to pay for the stock of Johnson, Graham and Strudwick, there remains a balance of $3,000 to be applied to the payment of his stock. He alleges that he had taken stock to the amount of $8,000, and that Johnson, finding he could not get the con-

tract for which he had made proposals, without having more stock than he and Graham owned, agreed with him to take of his stock the amount that might be necessary to make up the deficiency, and that in pursuance of this agreement, the contract was entered into with the clause above set out. He says, after this agreement with Johnson, he rested easy, under the belief that he had been relieved from a part of his large subscription, and that Johnson was to be substituted in his place and was to take the stock and pay for it, under his contract. He was afterwards surprised to find that Johnson was not disposed to carry out this agreement in good faith, and that the company intended to pay over to Johnson the amount due under his contract without retaining for any part of the stock which the plaintiff had subscribed for, and which Johnson had agreed should be paid out of the funds in the hands of the company; or in other words, which Johnson had agreed to take off his hands. The prayer is, that stock standing in the name of the plaintiff, corresponding with one-half of the excess due on the contract, shall be paid for out of the funds in the hands of the company and be transferred from the plaintiff to the defendant Johnson; that an account be taken to ascertain the true amount; and in the mean time, that the company be enjoined from paying over, and Johnson from receiving, the funds still remaining in the hands of the company.

The answer of the company admits the general facts alleged in the bill, but denies any knowledge of the terms of the private agreement, between the plaintiff and Johnson, and avers that upon being notified of the misunderstanding between them as to the terms of their agreement, the company made known to them an intention to pay over the fund to Johnson, and let them "fight it out."

The company was induced to take this course because it was known to the president and the chief engineer, who made the contract with Johnson, that he was at the time, excited by ardent spirits, and although sober enough to enter into the general contract with the company, yet it is probable he and

the plaintiff did not understand each other in regard to the precise terms of their private agreement; and because the plaintiff himself afterwards became a contractor to an amount sufficient to absorb all of the $8,000 for which he had subscribed, and in settlement of the contract, the whole amount of his subscription was included, although he protested and required them to exonerate him from an amount of his stock sufficient to fill up the contract of Johnson.

The defendant, Jones, as administrator of Johnson, also admits the general facts alleged in the bill. He denies any personal knowledge of the terms of the agreement, between the plaintiff and his intestate, if in fact there was any agreement, as to which he holds the plaintiff to strict proof. He insists, "that it could not have been the intention of his intestate to take the stock of the plaintiff off his hands at par; because as he alleges, the stock was then greatly under par, and his intestate "not being a professional contractor, did not desire any greater contract than one estimated at double the value of his own stock and that of Mr. Graham, (who had agreed to do one-half of the work, in order to pay for his stock,) *it being a prevalent opinion at the time, that a contractor, with a contract yielding double the amount of his subscription, might pay the expenses of the work from the money*, and the stock was then not worth par, and no prudent man would have purchased it at that price; the rate of depression may be judged of from the fact, that the sub-contractors, under Johnson, allowed a discount of 25 per cent, to obtain *cash* for their work." So the defendant denies according to the "best of his knowledge and belief," that his testator ever agreed to purchase the stock of the plaintiff, or any part thereof, as is charged in the bill. He believes the amount of the agreement was, either, that Johnson was to become paymaster to the company, for a part of plaintiff's stock, "leaving the plaintiff liable to him for the amount thus paid to his use," or that the plaintiff was to contribute hands, &c., and aid in doing the work, and thus pay for his stock, as Mr. Graham did. In support of this last suggestion, he avers that his intestate offered to allow plain-

tiff to do work on a part of his contract and the plaintiff declined doing so. Defendant also alleges, that the whole of the plaintiff's stock was worked off by himself, in a contract amounting to some $28,000, which he had obtained upon the ground of this very stock; so, as he insists, the plaintiff has had the benefit of working off the whole of his stock, and can claim nothing by reason of any agreement he had made with Johnson, in regard to a part of it.

The equity of the plaintiff is an emanation or deduction from an obligation, which was assumed by the gentlemen who were most active in procuring individual subscriptions for stock, and which was afterwards carried into effect by the president and directors acting under the instructions of the individual stockholders, and was by them, according to their advertisement for contracts, made one of the terms of the letting; that is to say, contractors were required to receive payment, one-half in cash, the other half in the stock of individual subscribers.

It is apparent that such an obligation or undertaking on the part of the individual stockholders, was in direct contravention of the rights of the State; inasmuch, as the State was to furnish *two-thirds* of the funds for the construction of the road, and, although, not then represented, was to contribute two-thirds of the company's capital. It was accordingly made a subject of anxious consideration by us, whether such an undertaking on the part of the individual stockholders, was not exposed to the objection of being against public policy, as tending to induce the officers of the company to allow more to contractors than their work was worth *in cash*, in order to induce them to take individual stock in part payment, the result of which would necessarily prejudice the rights of the largest stockholder. The disclosure in the answer of the defendant, proves that it was the prevalent opinion at the time, "that a contractor, with a contract yielding double the amount of his subscription, might pay the expense of the work, from the money;" in other words, might make his stock clear; that is, things were in such condition, that the State, as was supposed, would

pay all of the money required for the construction of the road, and yet individuals would own one-third of the stock! This disclosure together with the further fact, that contractors who took one-half in stock were allowed such prices, as to enable them to let out sub-contracts to be paid in cash at a discount of 25 per cent. is really startling.

If the original undertaking was against public policy, of course this Court could not, in any way, aid in carrying into effect an agreement growing out of this undertaking, or based upon it.

After much reflection, we have come to the conclusion that this objection to our entertaining the cause, has been removed, by the concurring acts of the executive and legislative departments of the government. They have, from high considerations of *public good*, concurred in, approved of, and ratified the action of the individual members of the company in regard to the undertaking, with full notice; and it is proper to say, that the matter was at all times openly avowed and justified upon the ground of *public good*. The executive officers have caused the subscription on the part of the State to be paid; and the Legislature, at its last session, appropriated one other million of dollars, to aid in the completion of a work which they deemed so important to the interests of the State.

His Honor in the Court below, a motion coming on to be heard upon bill and answer, dissolved the injunction. In this there is error. The distinction between injunctions to stop an execution at law, where the defendant has by a judgment, established his legal right, and injunctions, in cases where there has been no adjudication of the rights of the parties at law, and consequently where both parties stand in this Court, upon an equal footing, *oath against oath*, and the Court is to dispose of the motion upon the whole matter taken together, is explained and settled, *Purnel* v. *Daniel*, 8 Ire. Eq. 9; *Caphart* v. *Mhoon*, Busbee Eq. 30; *Loyd* v. *Heath*, ib. 39; *McMeely* v. *Steel*, ibid 240.

In our case, there has been no adjudication of the rights of the parties. The plaintiff alleges the agreement was, that

Johnson would take off his hands an amount of stock sufficient to fill his contract, and that Johnson's motive for doing so, was because he could not otherwise get the large contract for which he had made proposals. The contract of Johnson, *prima facie*, supports this view of the transaction. The defendant, as administrator of Johnson, makes a formal denial of the agreement alleged by the plaintiff, and suggests that according to his information and belief, the agreement was, that the plaintiff should aid in the work so as to do a part, corresponding with his stock; or else, that the plaintiff was to pay his intestate, *in cash*, the amount of stock that his intestate should work out under his contract. This latter suggestion is not very probable, because there was no sufficient motive for the plaintiff to agree to pay *cash* for his stock, or a part thereof, whereby he would forego the benefit of getting it off his hands upon much better terms, according to *the understanding*, which, it is admitted, the president and directors of the company were carrying into effect in letting out contracts.

So the question is, did Johnson agree to take off the plaintiff's hands so much of his stock as was necessary to fill his (Johnson's) contract? Or was it a part of the agreement that the plaintiff should furnish hands, &c., and do a corresponding portion of the work? No decision can be made in regard to it, at this stage of the proceeding, and the injunction ought to have been continued until the hearing.

It is said the bill shows no ground for coming into Equity, and the plaintiff had a remedy at Law for a breach of the agreement. The reply is, here is a specific thing, which one of the defendants has agreed to do, and here is a specific fund in the hands of the other defendant, who holds a covenant on the part of his co-defendant, taken in behalf of the plaintiff according to a prior understanding, and the possession of the fund puts it in the power, and makes it the duty of one of the defendants, to see that the agreement is carried into effect by the other. Again, it is said, Equity will not enforce the specific performance of an agreement to transfer or to accept

stock. The reply is, that may be so in reference to government stock in England, which, like corn or flour, may be bought for the money in market at any time; but the doctrine has no application to rail-road stock.

We incline to the opinion that neither of those objections is tenable, but do not now dispose of them definitely.

In regard to the allegation that the plaintiff, after the alleged agreement with Johnson, took a large contract, and in that way absorbed the whole of the stock which he had subscribed for, according to the understanding and terms of letting, by reason whereof he impliedly waived any right to have a part of his stock worked off by Johnson, it is sufficient to say, that is *new matter*, and rests upon a mere allegation of the defendants, to which the plaintiff has had no opportunity of replying. So it cannot be taken into consideration at this stage of the cause. Decretal order reversed; the injunction must stand over until the final hearing.

Per Curiam. Decree accordingly.

JAMES P. STIMPSON AND OTHERS *against* FRANCIS FRIES AND OTHERS.

A deed of trust, after registration is viewed in a different light in the Courts of this State, from what it is regarded in the English courts, and is with us considered in the nature of a mortgage.

Where a deed of trust is made, leaving it discretionary with the trustee to pay such debts as he might *think best and find most convenient*, it was *held*, that the trustor had a right to control the application of this fund by directing what debts he should pay: but that as to any debt he had paid, or had assumed to pay, and as to his own debts, he had a right to retain funds to pay them before he was bound to obey such new directions.

The debts which the trustee under these circumstances had promised by *parol* to pay, come within the principle above declared and are not within the statute of frauds.

Cause removed from the Court of Equity of Davidson county at the Spring Term, 1855.

The plaintiff Stimpson, as trustee, and the other plaintiffs who are the creditors of W. J. McElroy, filed this bill against the defendant Fries and other creditors, seeking to have certain property and effects delivered over to him the said Stimpson, according to the provisions of a deed in trust made to him on 2nd January, 1855, for the satisfaction of the debts therein specified.

In September, 1854, William J. McElroy being greatly in debt, and upon the eve of insolvency, executed the following instrument of writing, which was also signed by the other defendants, viz: "Whereas, W. J. McElroy is indebted to the Greensboro' Mutual Life Insurance and Trust Company in the sum of about $3,575 72, principal and interest, (see the papers and evidences of all in the hands of David P. Weir, for more certainty)—also other debts, and is desirous to make an assignment, and Francis Fries his general agent and attorney, to collect all his debts, dispose of and sell all his estate and property, and pay all his debts; which arrangement is assented to by David P. Weir, treasurer: Wherefore for the the purposes aforesaid, and for and in consideration of the sum of ten dollars, to him in hand paid by the said Francis Fries, the receipt of which is hereby acknowledged, he the said William J. McElroy doth hereby, by these presents constitute, nominate and appoint the said Francis Fries his general agent and attorney, to sell and dispose of all his estate, real and personal, in the State of North Carolina, or elsewhere, and pay and satisfy the said debts due the said Trust Company in Greensboro' first of all others, and next, such debts as the said Fries may deem best and find the most convenient;—to make all deeds, writings and conveyances which the said Fries may deem proper and necessary; in his name, to act as general agent of the said W. J. McElroy. And the said W. J. McElroy, by and with the consent of the said David P. Weir, Treasurer, hereby, for value received, transfers, aliens and conveys to the said Francis Fries all his estate, property, slaves, and effects, notes, contracts, and judgments, and other evidences of debts, to him the said Francis Fries,

his heirs, and assigns, for the purposes aforesaid, hereby ratifying and confirming any and every thing which the said Fries may do in these premises: Said Fries is to have his expenses paid, but is not to be liable for any more than honesty of performance. In testimony whereof, the said parties have set their hands and seals, this 22d day of Sept. 1854.

W. J. McElroy, [seal.]
D. P. Weir, [seal.]
F. Fries, [seal.]"

By virtue of this contract, the defendant Fries took possession of the entire estate of the defendant McElroy, consisting of land, negroes, evidences of debts due him, stocks, horses and other personal property, some of which he has sold, and all of which he submits to account for, as required by the Court of Equity.

By virtue of the authority given him in the foregoing deed, the defendant Fries paid many of the debts due and owing by McElroy: for some other of his debts he was responsible by force of another deed of trust, executed in 1848, in which he was also the trustee, and which included some of the property conveyed by the deed of 1854: for other debts due by McElroy, he had become bound by his express undertakings to pay them out of the effects in his hands, and besides these, there were debts due to Fries individually, and as the partner of a firm. Those, *i. e.* the debts for which he was originally liable, the debts which he had assumed to pay, also the debts due him as above stated, he insists in his answer, should be allowed him at any rate, before paying over the funds to the plaintiff Stimpson: Various other debts were presented to him for acceptance or payment, which he declined paying or expressly assuming, but to these creditors he made a general declaration that his intention was, after discharging those above set out, to pay them, and all the other of McElroy's creditors *pro rata* out of the surplus: and he submits whether, as some of these creditors had probably relied on him in consequence of this general declaration, and had forborne to take other steps to make their debts safe, he ought not to be per-

mitted to pay them also: but as to this he does not insist and professes a willingness implicitly to abide the judgment of this Honorable Court. The defendant Fries in his answer discloses minutely the state of the fund in his hands—what amount he had paid under the trust of 1848—what remains to be paid on that account—what he has paid under the trust of 1854, and what he has definitely promised to pay: also the sums due him: what property he has sold and what remains. He admits that he was called on by the plaintiff Stimpson to pay the funds in his hands over to him, but believing the rights of the parties to be in a state of great uncertainty, he declined doing so. Answers were filed by the other defendants, McElroy and Weir, which do not vary the facts as stated above.

The cause was set down for hearing on the bill, answers and exhibits, and sent to this Court.

Morehead, for the plaintiffs.
Gilmer, for the defendants.

Pearson, J. In England, a deed of trust, which is not executed by the creditors, is looked upon as a conveyance made by the debtor for his own convenience in arranging his affairs, which he may control or alter at any time, and revoke at his pleasure, and which, of course, is void against creditors who sue out execution, *Walwyn* v. *Coutts*, 3 Meriv. 707; *Garrard* v. *Lauderdale*, 3 Sim. 1, and upon appeal, 2 Russ. and Mylne 451.

In this State, such deeds are looked upon in altogether a different light. *After registration*, the property is vested in the trustee, the trustor having no further control over it, or interest in it, except a resulting trust in the surplus after the debts are paid; the transfer is valid against creditors and subsequent purchasers, as being made upon a valuable consideration; in fact such a conveyance is treated as a mortgage—a third person, to wit, the trustee being introduced, because, from experience, it is found to be expedient to have the legal

title in him, rather than in the creditor or his representatives, especially when the parties suppose it will be necessary to sell the property. *Ingram* v. *Kirkpatrick*, 6 Ire. Eq. 463.

The deed executed by McElroy, 22d September, 1854, is not a mere power of attorney, but is a valid conveyance, the legal effect of which, is to vest the property in Fries, in trust, to pay the large debt due the insurance company, and then in trust to pay such other debts of McElroy as Fries "*may deem best and find most convenient.*"

The deed is drawn very loosely and inartificially, but there is a consideration set out as being paid by Fries, to wit, $10: this at once repels the idea of a mere power of attorney, which may be revoked the instant after it is made; and there are apt and proper words of conveyance, so as to vest the fee simple and absolute estate in Fries in trust, &c.

According to the decision in *Ingram* v. *Kirkpatrick*, this gave the insurance company an absolute right to have their debt paid out of the fund, because that debt is set out in the deed, and in regard to it, there is an express declaration of trust. The other declaration of trusts is indefinite, and must depend on the rule *id certum est quod certum reddi potest*: so that any debt which Fries either paid, or made a *definite promise* to pay, at any time before the trustor himself made a declaration of the debts which were to be paid out of this trust fund, and thereby made certain the indefinite words used, attached to the fund in the same way as if it had been set out in the deed of trust. This, of course, will take in any debt due to Fries, or to a company in which he was a partner, for by the trust to pay such other debts as *Fries may think best and find most convenient*, the intention evidently was to include all debts due to Fries; this implication, from the general motives and conduct of men, is nearly as strong, as if the debts had been set out in the deed.

Our conclusion is, by the deed of 1848 the legal title to the property therein named vested in Fries, in trust, to pay the debts set out in that deed: by the deed of 1854 an estate in equity in the property conveyed by the deed of 1848, and

the legal estate in the property not conveyed by that deed is vested in Fries in trust to pay the debt due the Insurance Company, then in trust to pay debts due Fries, and then in trust to pay such debts as Fries had actually paid, or made a definite promise to pay before he had notice of the execution of the deed of 1855.

By the deed of 1855, an estate in Equity is vested in the plaintiff Stimpson, of the surplus of the fund in the hands of Fries, in trust to pay the debts set out in that deed. The general power to act as the agent and attorney of McElroy, and to pay such debts as Fries "might deem best and find most convenient" was given in the deed of 1854, in consequence of the reliance which McElroy had in the financial skill and management of Fries, and possibly with an expectation that he would be able to make a composition or some favorable arrangement with the creditors, but in regard to this the rights of McElroy were not concluded, and he, as the owner of the ultimate estate, had a right at any time to interpose and direct that *certain creditors* should be paid, and this declaration of trust by McElroy, had the same legal effect as if these creditors had been named in the deed of 1854. So, the effect of the deed of 1855 is to revoke the general power given by the deed of 1854, or rather to control it by specific directions to pay certain creditors, and this we think McElroy had a right to do, provided he did not interfere with what Fries had done, or definitely promised to do. Such promises need not be in writing, for it does not come within the Statute of frauds as a promise to pay the debt of another; because Fries had the funds of the debtor in his hands, and the promise was made in reference to the fund, and not upon his individual responsibility—*Draughan* v. *Bunting*, 9 Ired. 10.

The decree must declare the rights of the parties in pursuance of this opinion, and the plaintiffs may have a decretal order for an account, if it is moved for.

Per Curiam. Decree accordingly.

JOHN FREEMAN *against* SAMUEL DWIGGINS AND OTHERS.

Where the admitted facts of a case were of an *extraordinary* character, and showed that the plaintiff, who was an intemperate man, with his faculties much impaired by that vice, was the victim of a gross imposition in the purchase of a stock of goods, the COURT will afford relief, notwithstanding it does not fully appear from the proof, that at the time of the trade, he was absolutely drunk.

CAUSE removed from Forsyth County.

Morehead, for plaintiff.
Gilmer, for defendants.

BATTLE, J. We have not had much difficulty in coming to the conclusion that the plaintiff is entitled to some relief, but have not found it so easy to determine what that relief should be. It is very certain, that at, and for some months before the time when the plaintiff contracted for the purchase of the defendant Dwiggins' store, the former had become an habitual drunkard, which had produced its usual effects, upon both his body and his mind. To what extent it had impaired the latter the witnesses do not agree. Most of those examined for the plaintiff testify that, in their opinion, the plaintiff was, during the latter part of the year, 1851, and the early part of the year, 1852, entirely incapable of transacting business with ordinary understanding and prudence. A few of the witnesses for the defendants, state that his mind was not at all affected by drunkenness; while the most of them, though not concurring entirely in that opinion, thought him capable of conducting ordinary business with ordinary prudence. Such was the opinion of *Milton H. Linville*, the gentleman who drew the deed in trust, which was executed by the parties on the 6th day of January, 1852. He states, that on that day the plaintiff "had been drinking, but was not drunk, though not completely sober," "that he had sufficient mind to transact ordinary business;" that "his

face and eyes seemed swollen considerably;" and that "he was tolerably drunk by the middle of the afternoon." Had the transaction between the parties been one of an *ordinary* character, we should have felt ourselves bound to declare, either that the testimony was so equally balanced that the plaintiff, upon whom lay the burden of proof, had failed to entitle himself to a decree, or that it was a proper case to be submitted to a jury upon an issue made up for that purpose. But we think it was not an *ordinary* transaction: on the contrary, that it was, under the circumstances, a most *extraordinary* one; and that it furnishes in, and of itself, plenary proof that the plaintiff was the victim of a gross imposition, practiced upon him by one, or both of the defendants. It is fully proved that at the time, and just before the trade was made, the defendant was in the habit of drinking to great excess, and that this was known to the defendant Dwiggins. It is certain, that the plaintiff had never been a merchant, and knew nothing of mercantile affairs; and it is equally certain that the defendant Tindall had been previously in the employment of Dwiggins, and was still in his confidence. It is clear from the proof, that the habits of the plaintiff had produced great derangement in his pecuniary affairs, and that he was rapidly approaching, and must soon reach, unless arrested in his mad career, a state of insolvency; of all which the defendant Dwiggins could not be ignorant. It was with such a man, and under such circumstances, that the defendant, Dwiggins, undertook to make a bargain for the sale of his stock of goods, of which he was anxious to dispose. Let us see what were the terms as finally fixed upon by the parties. We say nothing of the price of the goods, nor of the manner in which that price was ascertained by the inventory. That may have been fair, and was so, provided the defendants were honest; for it is evident from the proof that the plaintiff had nothing to do with that part of the business. But the value of the goods, having been thus ascertained to be $1445 79, the defendant, Dwiggins, received from the plaintiff as a cash payment (or what was equivalent to a cash payment) in part there-

for, the sum of $650, and upon the failure of the plaintiff to give personal security for the residue, to wit, the sum of $795 79, took, for the purpose of securing the same, a deed in trust upon a negro man slave, one horse, three wagons, and all the goods, wares and merchandise which the plaintiff had just bought at the price above stated. The deed was executed on the 6th day of January, 1852, and it was provided that if the debt was not paid on the 20th day of the same month, the defendant Tindall, who was the trustee, was, at the request of Dwiggins, and after twenty days advertisement, to sell the whole of the property therein conveyed, at public auction for cash, or, as it was called "ready money." In the mean while, and until such sale should be made, the deed goes on to say, that "it is plainly and well understood that said William O. Tindall, the trustee in this case, is to have entire possession of the store-house and its contents, viz: the goods, &c., &c.; is to keep the key of the said store-house and sell the goods of the same; receive the monies, &c., paid him for said goods; and have the entire control of the store-house, goods, &c., until said debt is paid." This latter provision, Mr. Linville tells us, was first suggested to him by Dwiggins in the absence of the plaintiff, but he believes the latter was present when it was talked of while he was writing the deed. How near this was to the middle of the afternoon, when the plaintiff was "tolerably drunk" we are not informed. But we think none but a lunatic, or a man stupified with drink, would have given his consent to such a stipulation. A credit of fourteen days, a sale of the goods at auction for cash, upon a failure to pay within that time, and the total exclusion from the management of his own store, were terms imposed upon the plaintiff, the like of which were never heard of before, and we trust, will never be heard of again. The result was, as every sane man must have foreseen, that in about four months the plaintiff's property was all sold to pay the residue of the debt for the price of the goods, and he was left totally insolvent. The robbery of the store while under the exclusive control of the defendant Tindall, whether actual or pretended, may be

regarded as a fortunate circumstance for the plaintiff, as it hastened the catastrophe, and the sooner dispelled from his mind the drunken dream of being a merchant. This Court would be faithless to one of its highest trusts, did it not afford him an adequate relief against those, who well knowing his condition, took advantage of it for their own selfish purposes of gain. What the precise character of that relief shall be, we have not found it so easy to determine. The contract cannot be rescinded, so as to put the parties in the same condition in which they were when it was made. That would be the proper course, were it practicable, but not being so, we must give a relief approaching as near to it as we can. That will be to consider the goods as having been disposed of by the defendant Dwiggins, through the defendant Tindall as his agent, for his own benefit, and to make him account to the plaintiff for a fair value of every thing he received from him. He ought to be allowed a fair rent for the occupation of his storehouse by the plaintiff and his family, and to be reimbursed for every thing which he may have paid for the plaintiff on the second trust. The necessary accounts must be taken with a view to this mode of settlement, and the cause will be retained for further directions until they come in. This case though resembling that of *Moore* v. *Reed*, 2 Ire. Eq. Rep. 580, in some respects, differs from it in the very important particular, that here the contract never was ratified by the plaintiff while in a condition better than he was when it was first imposed upon him.

PER CURIAM. Decree for an account.

SILAS LAMBETH *against* BRITTAIN WARNER.

A widow has a right to clear the lands assigned to her for dower, for the purposes of cultivation, where it is necessary for the enjoyment of the estate; provided it is done with a due regard to the proportion of wood and cleared land.

The clearing of sixteen acres in addition to thirty acres already cleared in a tract of 240 acres heavily timbered, is not out of proportion or unreasonable as regards the rights of the remainder-man.

APPEAL from an interlocutory order of the Court of Equity of Davidson County, Spring Term, 1855, dissolving the injunction heretofore granted.

No counsel for the plaintiff.
Morehead, for the defendant.

NASH, C. J. The plaintiff claims to be seized in fee of a reversion in a tract of land of which the defendant is in possession, having a life interest.

Samuel Lambeth died leaving a widow, to whom was assigned, as her dower in her husband's estate, the land in question. She intermarried with the defendant. The bill is filed for an injunction to stay waste. The bill charges, that at the time the defendant took possession of the land, there was on it a valuable growth of locust and other trees which he has cut down and sold to the rail-road company for sills. The defendant admits cutting down timber of that description, and its sale to the company, but avers he cut timber only on the thirty acres of land which were partially cleared when he went there, and sixteen acres more which he designed to clear and which it was necessary to do, to support his family, which consists of his wife and some children, himself and his children. Upon the coming in of the answer, the injunction was dissolved,

In his answer, the defendant states, that when he took possession, there were about thirty acres of cleared land, and that he intended to clear sixteen more; that he had cut down the timber, not only on that already cleared, but also on that he intended to clear, and that the sixteen additional acres were necessary to the support of the family. That the whole quantity assigned to his wife for dower was 240 acres, which was heavily timbered where it was not cleared.

Claiming the land in right of his wife, he has no greater

right to its use than she had. The widow's dower is assigned to her for the support of herself and family, and she has a right to clear land for cultivation, when it is necessary to the enjoyment of the estate, if done with a due regard to the proportion of wood and cleared land. *Shine* v. *Wilcox*, 1 Dev. and Bat. Eq. 631.

The clearing of the sixteen acres in addition to the thirty acres, is not an unreasonable act, as regards the interest of the remainder-man, and the defendant is not exercising his right in an unreasonable manner, and is at liberty to clear the sixteen acres, and to cut down and dispose of, as he may think proper, all the timber on it.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1855.

W. D. RANKIN AND OTHERS *against* WM. F. JONES AND OTHERS.

Where one of the members of a firm withdraws from it and assigns all the effects to the other partner, under an agreement that such partner shall pay all the firm debts, and he conveys all the effects in payment of his own debts, *held* that the firm creditors cannot follow these effects to subject them to the payment of the firm debts.

A prayer for an equity in the alternative, adverse to the main equity set up in the bill, cannot be allowed.

CAUSE removed from the Court of Equity of Henderson County.

The defendants demurred to the plaintiffs' bill, and the demurrer being set down for argument, the cause was sent to the Supreme Court by consent.

Baxter, for the plaintiffs.

N. W. Woodfin and *Edney*, for the defendants.

PEARSON, J. In 1853, William F. and John M. Jones, two of the defendants, entered into copartnership for the purpose of keeping a house of entertainment and of merchandising.

During that year, the plaintiffs became, severally, creditors of the firm for articles sold and delivered, and took therefor the promissory notes of the firm. In May 1854, the defendant John M. withdrew from the firm upon an agreement that the defendant William F. should retain all of the firm effects and pay all of the firm debts. In pursuance of this agreement, William F. took possession of the goods, furniture, &c., which had belonged to the late firm. *In June* 1854, William F. executed to the defendant, Edwin P. Jones, a deed, conveying to him all his property, real, personal and mixed, including that which had belonged to the late firm, in trust to sell and pay the debts of William F.: *first* paying the debts which William F. had contracted individually, and *then* applying the surplus, if any, to the payment of the debts which had been contracted by the late firm, William F. owning nothing except the property conveyed in the deed to Edwin, which is not sufficient to discharge both classes of debts. John M. Jones is insolvent.

The plaintiffs had each commenced actions upon their notes, but had not obtained judgments when the bill was filed. The prayer is that the fund may be applied, under the directions of this Court, so that the plaintiffs and other creditors of the firm shall be first paid out of the proceeds of the sale of such of the property as had belonged to the late firm, and that the individual creditors shall not be allowed to have the preference given to them by the deed of trust in regard to this part of the fund.

The defendants demur, and among other things insist that the plaintiffs have no equity.

In *Hassell* v. *Griffin*, ante 117 it is decided that the English doctrine, *i. e.* where, in consequence of the death or bankruptcy of a partner, a fund, composed of the effects of the firm and individual effects, is to be applied under the direction of a Court of Equity, the firm creditors are first to be paid out of the effects of the firm and the individual creditors out of the individual effects, the excess of either fund, if any, going in aid of the other, is so far affected by our Statute making all

contracts joint and several, and giving an action at law against the personal representative of a deceased joint obligor, that, in this State, individual creditors have no equity to insist that the individual effects shall be first applied to the payment of their debts. Whether the other branch of this doctrine obtains here, so as to give firm creditors an equity in regard to firm effects, is a question that we are not now called on to decide; because the doctrine, even in England, is not applicable to a case like that now under consideration.

The creditors of a firm have no lien upon the effects of a firm. If they take judgment and issue execution, they have a lien from its test, and may sell either the property of the firm or the individual property of the members, or both the firm and individual property; but until the execution issues they have no lien.

When, by reason of death or bankruptcy, the fund comes under the direction of a Court of Equity, then, according to the English doctrine, stated above, they have an equity or a *quasi lien* (as it is termed) which is "worked out of the equity of the partners as against each other" by substituting the firm creditors to the right of the partner who has an equity to be relieved from these debts by having them paid out of the effects of the firm. If the partner has no equity, it follows that the creditors of the firm can acquire none by substitution; for theirs is but secondary and subordinate to his.

If one of the partners, as in our case, transfers all of his interest in the firm effects to the other, and is content with his personal undertaking to pay the firm debts, the retiring partner has no longer any lien in equity in regard to the effects of the late firm, and the effects, supposing the transfer to be *bona fide*, become the property of the other, subject to be sold by such of his creditors, without discrimination, as issue executions, and subject to be sold and transferred by him in trust for the payment of his debts according to the preference he may prescribe, in the same way as any other property he owns.

In *Ex parte Ruffin*, 6 Vesey, 128, the notion that what has

been partnership effects shall be treated as continuing to be partnership effects, so as to be subject to an equity of the firm creditors after a *bona fide* transfer of it by one partner to another, is repudiated and a decided opinion is expressed that, after such transfer, firm creditors have no ground whatever upon which they can set up an equity for a preference in regard to what had once been effects of the late firm. This doctrine is followed by many cases in England and in this country, and is treated of by the text writers as settled: Story on Partnership, sec. 359, 361 and notes: 2 Story Eq. sec. 1243 to 1253 and notes.

The bill is so framed as to pray for an account and distribution of the property contained in the deed of trust, *according to the provisions of the deed*, in the event that the plaintiffs and the other firm creditors have not an equity to have the effects, that have belonged to the late firm, *first* applied to the payment of their debts. These two prayers are clearly inconsistent: by the one, the plaintiffs seek to set up an equity *adverse* and *against* the deed of trust, on the ground that W. F. Jones had no right to make it, because of their prior equity or *quasi lien;* by the other they seek to set up an equity *under* the deed of trust. This cannot be allowed. Sometimes a plaintiff, who fails in his main or primary prayer, may set up a secondary equity under a prayer in the alternative; but this secondary relief must not be inconsistent and at variance with the grounds upon which he attempts to set up his main or primary equity; in a few words, he cannot first claim against a deed and, failing in that, fall back and set up a secondary equity under the deed.

PER CURIAM. Bill dismissed.

HUMPHREY P. COOK *against* SAMUEL B. GUDGER.

In order to convert an absolute conveyance into mere security for money loaned, it must be alleged and proven, 1st, That the agreement was that

the property should be conveyed as a mere security. 2nd. That the defendant was induced to execute an absolute conveyance by fraud, imposition or undue influence.

A mere gratuitous offer to allow the assignor of a title bond for land to pay back the purchase money and interest, if done within twelve months, is not a sufficient ground to authorise the Court to convert an absolute conveyance, into a security for the money paid.

CAUSE removed from the Court of Equity of Buncombe County.

The bill alleges that plaintiff contracted with one William Young for the purchase of a tract of land, including a mill-shoal, at $120, and executed two notes therefor, due at different dates, and the said Young executed his bond for title on the payment of the purchase money; that he cleared the land and built a valuable grist-mill on the same, which did a good business and added at least three hundred dollars to the value of the premises; that plaintiff paid on the first note $53 before it fell due; that he afterwards took up these notes and gave a third note for $67; that he was in the employment of the defendant at the time, and worked for him to pay a part of the note; the amount of work done he does not remember; that plaintiff afterwards bought some beef-cattle of the defendant and gave his note therefor, amounting to $25 60; that, being in difficulties, and fearing that he would be harrassed and his property sold for this debt to Young and the debt to the defendant, it was agreed that plaintiff should pledge the said property to the said Gudger, the defendant, to secure the debt which he owed him and for the balance of the debt to Young, which he, defendant, was to take up; and that these two debts, amounting to $72, were to be paid to defendant in twelve months; that accordingly, Young's debt was satisfied to him by defendant, and plaintiff became indebted to defendant in the sum of $72 50, and to secure the payment thereof within twelve months, the plaintiff was to assign Young's bond to make title, over to defendant; and the plaintiff did put his name to an assignment prepared by the defendant on the back of the bond; and plaintiff, intending to go to the

gold mine and work and raise the money, gave the defendant possession; that he went off to the gold mines and began to work, but was taken sick and was unable to return within the twelve months; that he remained absent for several years, (about 8 in all) and in the mean time defendant improved the property by adding a saw-mill—that he paid, in corn and oats, on the debt, some twenty-five dollars, and that the profits of the mill have been more than sufficient to pay the remainder; that the defendant, in the mean time, got a title from Young, and still holds the same. He alleges further, that he has little knowledge of letters and knows nothing of business and had entire confidence in the defendant, and believed in his profession of kindness, and a disposition to favor him, and signed the endorsement "not knowing but that it fully contained the agreement;" that he has called on the defendant to account for the profits and to convey to him the premises, which he has refused to do.

The bill prays for an account and conveyance.

The defendant, in his answer, denies that he purchased the land in question under any contract or agreement to reconvey. He denies that there was any hardship in the transaction or any fraud or imposition in taking the assignment of the title bond. He denies that plaintiff is illiterate, but says he can read and keep accounts; and that at the time of executing the assignment in question, read the same or had it read to him deliberately and distinctly. He says after the bargain was made and the assignment executed, plaintiff "made some remark complaining of the price which he had agreed to receive for said lands, to which this defendant simply replied that he would take his money and interest if paid to him in twelve months, to which the complainant made no reply whatever." He was, at that time, willing to have received the money and interest, because, although he bought the property at a reduced price, he did not particularly need it, and would have taken that amount from the defendant or any one else. Since then, however, he says he has put valuable mills on it, and from a turnpike road being made near it, it has become val-

uable, so that he is now unwilling to part with it. He denies that the mill put on it by plaintiff was of any value, or that he received any profits from it. He denies that any payments were made to him by plaintiff in oats or any thing else.

Replication and issue. There were proofs taken and the cause being set for hearing was sent to this Court.

N. W. Woodfin, for plaintiff.
J. W. Woodfin, for defendant.

Pearson, J. To sustain the equity which the bill seeks to set up, two things must be alleged and proved, *i. e.*, 1st, That the agreement was, that the interest of the plaintiff in the land should be assigned as a mere security for the debt. 2d, That the plaintiff was procured or induced to execute the assignment (which is an absolute one) by fraud, imposition or undue influence, advantage being taken of his necessitous condition.

In respect to the latter, the plaintiff fails, both as to the allegation and as to the proof.

The allegation is simply "and your orator did put his name to an assignment prepared by the said defendant on the back of said bond." The proof is, that after the parties had made their agreement, they went to the house of the witness Green, (who is examined by the plaintiff;) the writing was read by defendant in the presence of the plaintiff; the plaintiff is illiterate and is a bad scribe, but the witness supposed, from what the parties said and did at the time, that the plaintiff understood the nature and extent of his bargain or contract, and still has no reason to doubt it; the witness saw no evidence of any fraud or imposition.

A decree that an absolute assignment shall be converted into, and stand as a mere security for a debt, upon this allegation and this proof, would be at variance with all of the cases decided by this Court, and disturb the doctrine upon this subject which is now settled.

In respect to the former, the allegation is full enough; but the answer positively denies that the agreement was that the

land should be taken as a security for the debt, and avers that the agreement was for an absolute sale, and that the absolute assignment was drawn and executed in pursuance thereof: and that nothing was said about the plaintiff's being allowed to repay the money and take back the land until after the execution of the assignment. The defendant admits, that "immediately after the execution of the assignment, the plaintiff made some remark, complaining of the price which he had agreed to receive for his land, to which defendant replied that he would take his money and its interest, if paid within twelve months, to which plaintiff made no reply."

So far from falsifying the answer by two witnesses, the plaintiff has not been able to prove by a single witness that, according to the agreement, in pursuance of which the assignment was executed, the land was to stand as a security for the debt; nor has he been able to prove, by a single witness, any admission of the defendant other than that which is set out in the answer, or any act, or fact, inconsistent with it: so the question is, after an absolute deed had been executed, is a gratuitous proposition that if the money and interest be paid in twelve months the party may have back the land, sufficient to convert the assignment into a mere security, supposing the proposition to have been assented to?

We were not referred to any case, and we are unable to see any principle upon which such a doctrine can be sustained. The agreement was *executed* before the proposition was made; so it did not enter into, or form a part of the agreement, and was merely gratuitous. The plaintiff, if we suppose he assented to it by his silence, was under no kind of obligation to repay the money and interest in twelve months; so there was no mutuality.

Per Curiam. Bill dismissed.

ALLEN GENTRY *against* WILLIAM HARPER AND OTHERS.

Where a person, much in debt, paid for a tract of land and had a title bond made to convey to his daughter, an infant, in order to defraud his creditors, a Court of Equity will entertain a bill to subject the debtor's interest to the satisfaction of a creditor who has got a judgment and an execution with a return of *nothing made.*

CAUSE removed by consent from the Court of Equity of Ashe County, at the Spring Term, 1855.

The plaintiff, in his bill, alleges that at the May Term, 1854, of the Court of Pleas and Quarter Sessions of Ashe county, he recovered a judgment against the defendant, William Harper, for $202.83 principal and $26.56 interest, and that execution issued for the same which was returned by the sheriff "nothing made:" that the said judgment remains unsatisfied, and that the defendant Harper has no property or effects which can be levied on by an execution at law.

The plaintiff in his bill further alleges, that in Feb'ry, 1846, the defendant Harper agreed with the defendant Jacob Watters for the purchase, in fee simple, of a tract or parcel of land, lying in Ashe county, adjoining, &c. (describing it) at the price of $106, which has been nearly all paid to the said Jacob by the said William.

It is further alleged in the plaintiff's bill, that at the time of this purchase, William Harper was involved in debt, and for the purpose of fraudulently concealing his interest in this land from his creditors, he caused a bond for the title for the same to be made by the said Jacob Watters to the defendant Elizabeth Harper, who is the daughter of the said William, in which it is covenanted that he, said Jacob, would make a title to the land in fee simple, upon the payment of the purchase money. That Elizabeth was not a party to this agreement, but was at that time an infant, living with her father and totally without means; that she had no knowledge of this bond or agreement, and that her name was used for the sole purpose of defrauding the creditors of the defendant Harper,

among whom was the plaintiff, and that the said bond was in fact delivered to the said William for his own use and benefit and not for that of the defendant Elizabeth, and that the bond remained in his possession and custody until after the rendition of the judgment, and after the said Elizabeth came of age: that then, with the sole purpose of concealing his property and of defrauding the plaintiff and his other creditors, the said William Harper delivered up the said title bond to the said Jacob Watters, who still has the same, and denies that he has any interest in the land in question: that plaintiff has tendered to the defendant, Jacob Watters, the remainder of the purchase money, which the said Jacob, with a like fraudulent purpose refuses to receive and to make the title of the land in question, and denies that the said William has any interest in the same. Elizabeth Harper and Jacob Watters are made parties defendant with William Harper.

The prayer of the bill is, that the interest of the defendant Harper in the land may be declared by this Court and subjected to the satisfaction of the plaintiff's debt.

The defendant Harper filed a demurrer to the whole bill, and the same being set down for argument, was sent to this Court.

Lenoir and *Neal*, for plaintiff.
H. C. Jones, for defendants.

Pearson, J. From the principles decided in *Gowan* v. *Rich*, 1 Ire. Rep. 533; *Dobson* v. *Erwin*, 1 Dev. and Bat. Rep. 570, it is clear that the debtor has not such an equitable or trust estate as is liable to be sold under an execution at law: and it is equally clear that he has such an interest in the land as a court of equity will subject to the claims of creditors: upon the broad ground, that it is against conscience for debtors to attempt in any way to withdraw property or effects from the payment of debts. If the Courts of Common Law cannot reach the debtor's interest, a Court of Equity will.

Per Curiam. Demurrer overruled.

JOHN McGILL AND OTHERS *against* JOHN HARMAN & ANOTHER.

Where a son receives from his father, without consideration and in contemplation of the father's insolvency, and with the purpose of fraudulently withdrawing that much from the payment of the father's debts, a note on a third person due the father, and transfers the same in part payment for a tract of land, the creditors have a right to hold the son liable to the amount of the note, and the land will be held as security for the payment thereof.

CAUSE transmitted from the Court of Equity of Gaston County.

Guion, for the plaintiffs.
Avery, *Thompson* and *Lander*, for the defendants.

PEARSON, J. It was properly conceded upon the argument, that, as the Montgomery land was not conveyed by the defendant, John Harman, the debtor, the case does not come within the operation of 13 Elizabeth, Rev. Stat. ch. 50 sec. 1 act of 1715, which is construed and explained by act of 1840, Ire. Dig. Man. 195. It follows that the remedy of the plaintiffs, if they have any, is in this Court.

The bill puts the equity of the plaintiffs upon the ground that the transfer of the note of $700 on Crawford by John Harman, the debtor, to his son the other defendant, was a fraudulent contrivance, whereby to put that part of his estate beyond the reach of creditors, and to enable the son to invest it in the Montgomery land, and that at the time of the transfer, John Harman was insolvent.

The defendant, David G. Harman, admits that at the time the note on Crawford was transferred, his father was insolvent, and that the note was transferred to him for the purpose of being transferred to Montgomery in part payment for the land, but he avers that "in August, 1848, more than a year before the note was transferred, his father being then in good circumstances, and owning property greatly exceeding the amount of his debts, being desirous of advancing him who was his youngest son, and just arrived at the age of twenty-one to *an*

amount equal in value to the advancements which he had made to his other sons and daughters in money or property, executed him a note for six hundred dollars." That in November, 1849, his father paid off this note by an order on one Briggs, from whom he received $635 in cash, being the amount of his father's note and interest for one year and three months: that soon afterwards his father, being in need of money, told the defendant that he had a note on Crawford for $700, due ten months after date, with which he could purchase the land of Montgomery as well as with cash, and it was agreed that he should take that note, deducting the interest, and let his father have the money. Accordingly, he took the note at $665, and paid his father therefor the $635 received of Briggs, and the balance in cash, making, in all, $665; and in January, 1850, he bought the land from Montgomery, and assigned to him the note on Crawford in part payment.

Admit, that in August, 1848, when the father resorted to the most singular and unheard of mode of making an advancement to his son, by giving him a note for $600, due "one day after date," with interest from date, professing to be for value received, the father was solvent and owned more property than was sufficient to pay all the debts which he then owed: say his land, negroes, &c., were worth $5,000, and his debts did not exceed $2,500, still there is this fact, i. e., the father had entered into speculations by purchasing several leases of gold mines, supposed to be very valuable, at high prices, and which, as is stated in the answer, "turned out to be with him, as, defendant has been informed, it has turned out with many others, a *ruinous* business"—which strongly tends to show that the father did not act *bona fide*, and had a fraudulent intent in making this note to his son, to provide for future contingencies—add to this, at the time the father gave the order on Briggs, and at the time he transferred the note on Crawford, he was utterly insolvent, and the question is, could the son then in conscience, and with a just regard to the rights of his father's creditors, accept from him payment of the note which

had been executed without *consideration?* Did he not know that his father was violating the maxim, "one must be just, before he is allowed to be generous?" If the father had been dead, a court of equity would have postponed the payment of this note until all the claims of creditors were satisfied. This doctrine is well settled, and the accident of the debtor's being alive and hopelessly insolvent, cannot affect the claims of creditors. But add to all this, that the reason which is set up in the answer, for the father's resorting to this mode of making an advancement, viz, a desire to give this son an amount equal in value to the advancements which he had made to his other sons and daughters in money or property, is proven to be false! To one daughter, the proof is, he had given nothing; to another, but a trifling amount; and in regard to the other children no proof is taken. So here is the suggestion of a falsehood. The conduct of the father and son is left without explanation, and they stand convicted of an attempt to withdraw, by a fraudulent contrivance, a portion of the father's funds from the satisfaction of his debts.

The bill seeks to treat the land purchased of Montgomery, as the property of John Harman, and to subject it to the payment of his debts. This equity is not sustained by the proofs. Daniel G. Harman purchased the land of Montgomery, and the fraud established is a conversion by the son, of the Crawford note, and its application in part payment for the land. The creditors have an equity to follow this note and to hold the land as a security for its payment, so that the amount with interest may be applied to the satisfaction of their debts. A proper decree will be made to effect this purpose, but they are not entitled to treat Daniel G. Harman as a trustee for them, and follow the land as upon a misapplication of a trust fund, for he never was their trustee, and their equity is to follow the note of Crawford, which their debtor attempted by collusion with his son, to place beyond their reach. See preceeding case, *Gentry* v. *Harper*, 177.

Decree.

JAMES JOHNSTON, ADM'R., *against* CHARLES OVERMAN AND OTHERS.

The personal representative of a trustee, constituted by a deed in trust, has no right to plead the act of limitation passed in 1789, (the two years act,) nor the statute of 1826, (creating a presumption of satisfaction, &c., within *ten years,*) against his *cestui que trust* calling for a settlement of the trust.

CAUSE removed from the Court of Equity of Mecklenburg County.

Osborne and *Lowrie*, for plaintiff.
Wilson, for the defendants.

PEARSON, J. On the 8th of February, 1839, Samuel Lowrie, the intestate of the plaintiff, executed a deed, conveying certain property to H. C. Owen, the intestate of the defendants, in trust, to sell and pay the debts therein named. On 28th of April, 1841, Owen sold all, or a part of the property, and died intestate about the year 1847. At January sessions, 1848, of Mecklenburg County Court, the defendants administered upon his estate and gave notice according to the provisions of the Act of 1789, for all creditors to prefer their claims.

If the case stopped here, it would be the ordinary one of an unsettled trust, and an order for an account would be a matter of course. But the defendants aver that their intestate made sale only of a negro boy, at the price of $415, all of which was disbursed by him on or about the day of sale, except a balance of $56.47, and they refer to a written statement signed by the intestate and found among his valuable papers after his death, and rely on the act of 1789 as a bar to the suit, and upon the act of 1826, as raising a presumption that the trust had been satisfied. The bill was filed 22d September, 1851.

There is no evidence that this statement, showing a balance of $56.47, was ever presented to the plaintiff's intestate, or

that there was ever an understanding that this balance closed the trust: so, the trust, at the death of Owen, remained open and unsettled. Consequently, neither the act of 1789, or of 1826, applies to the case.

If the written statement had been presented by Owen to Lowrie as a settlement of the trust, showing the balance due and still in his hands, subject to the order of Lowrie, that would have terminated the relation of trustee and *cestui que trust*, and put Lowrie in the position of an ordinary creditor. But the trust was not closed in this way; so we have an express trust by agreement of parties, which is open and unsettled at the death of the trustee. The question is, does the Act of 1789, or of 1826, apply to such a case, so as to bar the right of the *cestui que trust* to call for an account and settlement of the trust fund after the expiration of two years, or to raise a presumption of satisfaction after the expiration of ten years?

We confess, the idea that the personal representatives of a trustee may keep the trust fund in hand and bar the equity of the *cestui que trust* (who is the real owner of the fund, and for whom the trustee holds) unless it is called for within ten years after their qualification, is entirely a new one to us!! It is obvious, from the wording of the statute, and "the reason of the thing," that its application is confined to debts or claims where the party has a mere "right" or "chose in action," to be enforced by a suit in a court of Law or in Equity, and has no application to cases where a party has *an estate* as contradistinguished from a right. See *Thompson* v. *Thompson*, 1 Jones' Rep. 430.

In our case, the plaintiff's intestate owned the equitable estate in the trust fund, the defendant's intestate held the legal estate *for* him. This legal estate, by the death of the trustee, devolved on his personal representatives; but this devolution did not divest the equitable estate of the plaintiff's intestate and turn it into a "mere right," and the representatives of the trustee held the fund *for*, and not *adversely to*, or *against* the *cestui que trust.*

The same considerations show that the act of 1826 has no

application to our case. In regard to this latter statute, the question is settled: *Saltar* v. *Blount*, 2 Dev. and Bat. Eq. 218. It is there decided that the right to a legacy or distributive share, "is not within the act of 1826, and that its operation is confined to constructive trusts, and such other equitable interests of that nature, as, previous to the passing of that act, were barred by time, in analogy to the statute of limitations in England, barring entries into land." This, of course, excludes the operation of the act from our case, which is that of an express trust by the act of the parties, which remained open and unsettled. The defendant's counsel evidently misconceived the legal effect of the written statement found among the papers of the trustee after his death.

PER CURIAM. The plaintiff is entitled to an account.

G. W. JONES *against* R. HENRY AND R. POSTON.

Where a trustee admits the allegation in a bill that he has committed a breach of trust in giving a release, and the releasee does not meet the allegation that he has contrived to obtain such release, but states immaterial matters as his answer, the Court will decree against them both.

CAUSE removed from the Court of Equity of Buncombe County.

N. W. Woodfin, for the plaintiff.
Baxter and *Gaither*, for defendants.

PEARSON, J. The case was treated at the bar, as if standing upon an order setting it for hearing upon bill, answer, exhibits, and *replications* to the answers. The transcript does not set forth that *replication* was taken to the answer of the defendant Henry, and, indeed, there is no order setting the cause for hearing.

We presume the parties desire the case to be decided, and

all proper orders are to be considered "*as made.*" It would relieve us from much perplexity if gentlemen of the bar would take the trouble to look over the transcript, and see that the proper entries are made, before it is sent to this Court. Sometimes clients suffer because counsel neglect this part of their duty, and it always embarrasses the Court if the formal and proper entries are not made.

The bill sets out a clear equity. Poston is considered, in this Court, as a trustee, holding the legal title to the rents and profits for the plaintiff. The defendant Henry *contrives* to get a release from this trustee; in other words, he, with full knowledge of the plaintiff's equity, induces the defendant Poston to commit a breach of trust, and brings forward, by way of *confession and avoidance*, charges against one Dean, who had acted as his agent, and makes an averment that one Rebecca Poston was entitled to a life estate, and so "most of the rents and profits, for which the action is brought, belonged to her," and the balance to one William Poston, or his heirs, if he be dead: none of which matters have any bearing upon the allegation of the bill, that the defendant Henry, by fraud and misinformation induced the trustee of the plaintiff to commit a breach of trust, *i. e.*, to execute the release, and discharge Henry from the payment of the rents and profits to which the plaintiff had a clear right.

The other defendant, Poston, admits that he did violate the trust, by releasing the defendant Henry from the payment of rents and profits which the plaintiff, as a purchaser for a full and fair consideration, was entitled to sue for and recover in his name, and avers that he was induced to execute the release by misrepresentation, &c. It is sufficient for us to say, he had no right to execute the release; his confederate Henry, with a knowledge of the facts, had no right to ask him to do so, and cannot, in equity and conscience, make use of it.

Per Curiam. The injunction must be made perpetual.

JAMES F. McNEELY, GUARD'N., *against* J. F. JAMISON, GUARD'N

The Courts of Equity in this State cannot send the estate of an idiot out of their jurisdiction. But where there is an idiot residing in another State, and having a guardian in such other State having funds in the hands of a guardian in this State, the court can make an annual allowance for his maintainance to be paid to the guardian abroad.

CAUSE removed from the Court of Equity of Rowan at the Spring Term, 1855.

Reese Johnston had been found by an inquisition of Rowan county, to be an idiot, and for more than twenty years had been under the guardianship and protection of guardians appointed by the County Court. For five or six years before the appointment of the defendant, which took place in 1853, the plaintiff, James F. McNeely, who was his brother-in-law and friend, had been his committee ; but it not suiting his circumstances to remain in North Carolina, he moved with his family to De Soto County in the State of Mississippi. At the earnest desire of Reese, who was greatly attached to Mrs. McNeely, his sister, wife of the said James F., he was permitted by the present guardian, the defendant, to accompany the family to that State, which was undoubtedly an act of kindness and propriety, and as such was sanctioned by his nearest friends and relatives. He is now with the said James F. McNeely, in Mississippi, and by a regular proceeding in the Probate Court of De Soto County in the said State, which had jurisdiction of the matter, he was declared an idiot, and the said James F. McNeely was appointed his guardian, who gave a good and sufficient bond in an ample sum to cover the whole estate of the said Reese Johnston which was all made to appear in this case by the record of the said Court, and by depositions as to the sufficiency of the sureties taken in the State of Mississippi, and filed in the cause. The prayer of the bill is that the defendant, J. F. Jamison, the guardian in this State, may be decreed to account and pay over the estate of his ward to the said J. F. McNeely, the guardian in Missis-

sippi; but if the Court shall believe that they have not the power to make such order, the prayer is in the alternative to order the said guardian to pay to his guardian in Mississippi, an annual allowance for the support and maintainance of the said idiot.

The present defendant, James F. Jamison, was appointed the guardian of Reese Johnston, by the County Court of Rowan, on the removal of the former guardian, and took charge of his estate. In his answer, he states the amount of his ward's estate. He admits that said Reese left the State with his brother-in-law and sister by his approbation and consent, and with that of all the near friends of the said Reese, and believes it was an act of discretion and humanity for him so to do. He expresses a decided wish that the funds in his hands may be handed over to the committee in Mississippi, but doubts the lawfulness and safety of so doing without the order and sanction of this Court.

The cause was set down for hearing on the bill, answer, exhibits, and testimony filed, and sent to this Court by consent.

H. C. Jones, for the plaintiff.
Boyden, for the defendant.

Battle, J. When the plaintiff was carried to the State of Mississippi and became a resident there, the courts of that State acquired a jurisdiction over his person, and had a right to have an inquisition of idiocy found, and thereupon to have a guardian appointed for him. Whether his guardian here could recognise such foreign guardian and have a settlement with, and pay over the idiot's funds to him, is not proper for us to say; but it is our duty to declare our opinion to be, that the courts of this State cannot make an order to send the idiot's funds out of their jurisdiction. Prior to the year 1820, it seems that the guardian of a minor orphan, appointed in another State, to which the orphan had removed, could not call upon his guardian here for the funds in his hands with the view to remove them from this State; and an

act was passed in that year, authorising it to be done, the provisions of which will be found in the Revised Statutes, ch. 54, sec. 23 and 24. That act is expressly confined to the guardians of infants, and of course does not embrace a case like the present. But though we cannot order the removal of the idiot's property, we cannot perceive any reason why we may not make an annual allowance for his support, and direct his guardian here, to pay it over to the guardian of his person in Mississippi. We have not, it is true, been able to find any direct authority for it; but we are not aware of any against it, and we think it may be done upon the same principle which empowers the court of chancery, in a proper case, to order a maintainance for an infant whose person is out of its jurisdiction. See 2 Story's Eq. jur. sec. 1354, b, where is cited *Stephens* v. *James*, 1 Myl. & Keene, 627; *Logan* v. *Farlie*, Jacob's Rep. 193, and *Jackson* v. *Hankey*, ibid. 265.

For the purpose of ascertaining what amount will be a proper allowance for the idiot, due respect being had to the amount of his estate, &c., there must be a reference to the clerk to inquire and report, &c., and the cause will be retained for further directions upon the coming in of the report.

Per Curiam. Decree accordingly.

EPHRAIM CLAYTON *against* JOHN LYLE, ADM'R.

Where a bill for an injunction is answered by the administrator of one who is alleged to have been a party to an equitable contract, and such administrator says, that he is ignorant of the facts alleged in the bill, but that he has understood and believes them to be totally different from those alleged, and such statement is strengthened by some of the allegations in the bill itself and appears probable and consistent, the injunction will be dissolved.

Where a memorandum of an agreement, made at the time when an absolute note was given, and the attendant circumstances show that such note was not to be absolute in reality, but was only to be collected on a contingency which has never happened, a Court of Equity will relieve against it.

Clayton *v.* Lyle.

This cause has been twice before this Court; *first*, upon an Appeal from an order of the Court of Equity of Burke County at the Spring Term, 1852, his Honor Judge Dick presiding, continuing the injunction (heretofore granted) to the hearing.

The motion to dissolve was made upon the coming in of the answer, and was considered upon the bill, answer and exhibits filed, the substance of which is sufficiently set forth in the following opinion of the Court delivered by the Chief Justice.

N. W. Woodfin, for plaintiff.
Avery and *T. R. Caldwell*, for the defendants.

Nash, C. J. The bill charges that the plaintiff and Samuel A. Lyle jointly undertook and did erect a certain public building in the State of Georgia, in the County of Lumpkin, for and at the price of $6850, and for additional work they were to be paid the additional sum of $1720: that the Inferior Court of the said County had full power to make such a contract, but their power, as to taxation to raise the necessary funds, is limited: The bill further alleges that, upon the completion of the work, the plaintiff and S. A. Lyle had a settlement, when it was ascertained, upon an adjustment of their accounts, that the sum due the latter was $4319, for which the plaintiff gave his bond, absolute upon its face, but that it was agreed, by a written paper executed by the said S. A. Lyle at the same time, that it was to be paid when received from the County of Lumpkin. This bond and the agreement were dated on the 8th day of September, 1841. The bill then charges, that the Inferior Court of Lumpkin County, though frequently applied to, refused to pay for the building erected, upon the ground that their authority to levy taxes is, by law, limited, and that they have gone to the limit of their power in that respect, and that plaintiff has been advised that he cannot compel payment from the Court.

S. A. Lyle is dead, and the defendant, John Lyle, is his duly appointed administrator, and has endorsed this bond to the

other defendant, R. C. Pearson, for the purpose of enabling the latter to sue in this State, and accordingly an action was brought against him on this bond, to the Spring Term, 1850, of Burke Superior Court, and judgment obtained against him for the sum of $6988 63.

The prayer is for an Injunction and for general relief.

The answer of the defendant Lyle states, that, of his own knowledge, he knows nothing of the contract between plaintiff and his intestate, but that he has understood and believes that the contract for erecting the building in Lumpkin was made by the plaintiff on his own account; that his intestate was employed by him to do the masonry and was not a partner in the contract; that at the time of the settlement in 1841 between the parties, the plaintiff gave his bond to the intestate for the sum that was due him for his portion of the work, and the intestate, at the same time, executed the paper set forth in the bill. The answer further alleges that the complainant and S. A. Lyle did make a joint contract with commissioners, duly appointed for that purpose, for building a court-house and jail in Lenoir, and a similar contract to build a house in the same place for William Davenport, and that he is informed and believes that the complainant has not used due diligence in collecting his claim in Georgia; that he might, by a writ of *mandamus*, have enforced the collection of what was due from the County of Lumpkin. It admits the obtaining the judgment, and avers that all the payments which have been made, either to him or his intestate, are properly credited on the bond, and allowed in taking the judgment. Injunction was continued to the hearing, and the defendant appealed.

The sole ground upon which the plaintiff can rest his application for relief, is, that he and the intestate, Samuel A. Lyle, were jointly concerned in the contract made for the building of the jail of Lumpkin County. If they were so jointly concerned, the defendant ought not to be permitted to force the money out of the plaintiff until he had collected it; upon no principles of equity would it be allowed. The answer, as far

as it can, denies that such was the fact, and the statements of the bill strongly sustain it. When the work was completed, the parties had a final settlement, and the plaintiff gave to defendant's intestate his bond to pay him the sum mentioned to be due him. It may be asked, if they were joint contractors to the work, then the County of Lumpkin owed to the intestate what was due him and not the plaintiff, and how came the plaintiff to give his bond, thereby acknowledging that he owed the money? That could not be, unless he had received it, which is not pretended, nor does the memorandum or paper, executed by the defendant, alter the case; the language of the paper is, "it was agreed that Samuel A. Lyle would receive the money due him from said Clayton as he collected it from Lumpkin Co., Georgia, provided he uses the lawful means to collect the money without delay." Now, this very paper, which is produced by the plaintiff, says expressly that the money was due the intestate from the plaintiff; so far from showing that the intestate was a joint contractor with the plaintiff, it is strong evidence to the contrary.

But further: though the bill charges a partnership in the work, it says not one word as to the terms. Again, as to the memorandum; it only says to the plaintiff, "if you will, without delay, use lawful means to collect what is due you, I will not press you for the money;" but it no where says, or intimates, if Clayton could not get it out of the County, that the intestate was to lose his money. No such thing. "I will receive my money as you receive it, provided you use the proper means." The only effect of the paper was to give the plaintiff a reasonable time to collect the money due him. He has waited ten years, the bond is dated September, 1841, and the bill is filed September, 1851. But the very ground upon which the delay was granted is taken away by the bill; it states that the County of Lumpkin has refused to pay, and that he is advised that they cannot be compelled. Why wait any longer? But further than this: the answer sets forth that several other building contracts were made between the intes-

tate and the complainant, and were so expressed; why was not this contract so expressed, if such was the fact?

Upon the whole, we consider the answer of the defendant Lyle as fully responsive to the bill, and that it answers its equity. The answer of Pearson is merely formal.

PER CURIAM. The interlocutory order of the Court below is erroneous, and, therefore, reversed.

The bill was continued over in the Court below as an original bill; replication was made to the answer, and proofs taken. The cause was set down for hearing, and sent to this Court again by consent. The substance of the evidence is recited in the opinion of the Court.

Same counsel as before.

PEARSON, J. When this question was before us, upon the bill, answer and exhibits, on the motion to dissolve the injunction, we were of opinion that the equity of the bill was fully and fairly met by the answer, and that the exhibits, viz: the note and the written agreement that "Samuel A. Lyle would receive the money as Clayton collected it from the County of Lumpkin, Georgia, provided due diligence was used, &c.," tended to repel the plaintiff's equity.

The case was continued over as an original bill, upon replication to the answer, and is now before us upon the bill, answer, exhibits and proofs taken. So the question is, does the evidence alter the case?

The depositions of George Clayton, B. Smith and L. Sawyer, although they do not prove a co-partnership in its legal and technical sense, prove clearly that the bids were made and the work was done—Clayton doing the wood-work and Lyle the brick-work—upon an understanding that although, for certain reasons which it is not necessary to set out, the contract was taken in the name of Clayton, and at his bid, and Lyle signed the bond as his surety, yet in point of fact, although not partners, they were *jointly* concerned in the *con-*

tract, in this way: Clayton was to do the wood-work at certain prices; Lyle was to do the brick-work at certain prices agreed on between them, as the *basis upon which Clayton was to put in a bid*, and, if he got the contract, he and Lyle were to be jointly concerned in doing the work at the prices previously agreed on, and were to look to the County of Lumpkin for their pay; so that if the County failed to pay, or there was any delay and difficulty in making the collections, the inconvenience and the ultimate loss, if any, were to be shared equally between them; because in this, as in many other building contracts, they found it to their mutual advantage to be jointly concerned.

The note, on which judgment at Law has been rendered, with the explanation given by the testimony of the witnesses, and the light thrown on the case by the other evidence and the conduct of the parties, (for instance, the fact that Lyle was on his way to Georgia, in the journey upon which he died, on purpose, as he told Sawyer, to try and collect a claim in which he and Clayton were jointly interested) was, therefore, in fact and substance, nothing more than a written memorandum, as is charged in the bill, for the purpose of showing how the balance stood at that time between the parties; and the agreement, that Lyle was not to be paid until Clayton got the money from the County of Lumpkin, was made, to show that the note was not to be taken as strongly as its words might import.

Upon full consideration of the pleadings, exhibits and proofs, we are satisfied that the parties were jointly interested in the contract, and if there is to be any loss ultimately, from the *repudiation* or refusal of the County of Lumpkin to raise the necessary amount by taxes, or otherwise, the loss should be equally divided between them, for the parties have furnished no mode of ascertaining the relative value of the "wood and the brick-work," and the testimony shows there is but little difference.

Upon the plaintiff's assigning to the defendant one-half of the claims which remain unpaid and unsatisfied, with power

to use his name in the collection of the same, &c., he is entitled to a credit for that amount upon the judgment, or to a decree to recover the same if it has been paid on the judgment. To fix the amount, if desired, a reference will be made to the Clerk.

No decree for costs on either side.

Per Curiam. Decree accordingly.

MARTIN CHAMPION AND OTHERS *against* WILLIAM J. T. MILLER AND OTHERS.

Where it appears, from the bill itself, that the plaintiff had a complete defence at law to a note, which was not set up, Equity will not interfere to stop the collection of the debt.

Cause removed from the Court of Equity of Cleaveland County.

The bill alleges that, in 1851, Richard Champion held two notes on the plaintiff, one for the sum of sixty dollars, and the other for about ninety-five dollars; that about the 3rd of June, in that year, they exchanged horses, and said Richard agreed to give the plaintiff $50 as boot, which was to be credited on these notes: also, that he made another payment in iron amounting to $17.32, which was likewise to be credited on the notes. That these credits were not entered as he had supposed they would be; that Richard Champion brought suit on the notes before a justice of the peace, and that the plaintiff did not attend the trial because he believed, from frequent conversations with Richard Champion, and from repeated assurances, that he had received the benefit of these payments as credits on the notes, or would receive the same when judgment was entered; he, therefore, suffered judgments to go against him by default, when, contrary to his expectation, the judgments were entered for the whole sum in each case, without any allowance of credit on either: that one is

for $63.05, and the other for $99. It further alleges that he made payments on the judgments, after they were rendered, amounting in all to $93.50; that, at the time of these payments, it was again agreed that he was to have the benefit of these former payments, on the judgments, and the said Richard remarked there was then very little between them; that the plaintiff took no receipt for these payments, from the fact of his having great confidence in the said Richard who was his relation; that these judgments were permitted to remain in the hands of the officer, without any attempt to enforce them being made, until after said Richard's death, which occurred in ———— The said Richard having made a last will and testament, Maria Champion was appointed Executrix, who qualified; that said Maria, after this, gave directions to the officer to collect these judgments, and he, the said officer, has levied an execution on the property of the plaintiff for the whole sum, without allowing any of these credits. The prayer is for an injunction and for general relief. On the coming in of the answer the injunction was dissolved, replication was made to the answer, and the bill ordered to stand over as an original bill. Maria Champion, the executrix, is since dead, having made a will and appointed defendants her executors, who have come in and made themselves parties. Depositions have been taken, and the cause set down for hearing on the bill, answer, proofs and former orders, and sent to this Court.

Shipp, for plaintiffs.
Lander, for defendants.

Battle, J. Without looking into the proofs, there is a clear and indisputable principle, apparent in the bill itself, which shows that it cannot be sustained and must be dismissed. When sued upon the notes, the plaintiffs had, according to their own statement, a complete defence at law, and they have assigned no sufficient reason why they did not avail themselves of it upon the trial before the magistrate. It is not pretended that they were prevented from doing so by any

fraud or deceitful contrivances of the defendant's intestate, or any other person; and the only reason which they give for having suffered the judgments to be taken by default, was, that from the plaintiff Martin Champion's "frequent conversations" with the intestate, and from "repeated assurances," he had no doubt that "he had received the benefit of his payments, until he learnt otherwise after the trial."

It is hardly necessary to cite authority to show that a Court of Equity will never interfere in such a case, and we will refer to two or three only, in our own Courts: *Pentriss* v. *Robins*, N. C. Term Rep. 177; *Peace* v. *Nailing*, 1 Dev. Eq. Rep. 289; *Bissell* v. *Bozman*, 2 Dev. Eq. Rep. 154.

The payments which are alleged to have been made after the judgments were taken, are subject to the same objection. The plaintiffs do not indeed say, in their bill, that suits were instituted upon the judgments, but such was the fact, as is shown by the exhibits filed with the answer.

If the plaintiffs were entitled, under the circumstances stated in their bill, to any relief at all, it was by the plain remedy at law of a writ of *recordari*. All the authorities concur in declaring that they cannot have any relief in Equity, *Wells* v. *Goodbread*, 1 Ire. Eq. 9.

Per Curiam. The bill is dismissed with costs.

HUGH PORTER AND OTHERS *against* ANN ROSS AND OTHERS.

A bequest made in 1818, to Mary Porter, of slave property, and "in case the said Mary Porter should die without issue, then and in that case, it is my will that the above named negro, &c., be divided among my six sons, and to the survivor, &c.," gives the absolute estate to the first taker, the limitation over being too remote.

Cause removed from the Court of Equity of Mecklenburg County.

Boyden, for plaintiffs.
Osborne and *Lowrie*, for defendants.

Nash, C. J. The question arises under the will of John Porter made in 1818. He therein gives to his daughter, Mary Porter, certain property, among which is a negro woman named Eliza. This item closes as follows: "and in case the said Mary Porter should die without issue, then and in that case, it is my will that the above named negro girl and her issue, be divided between my six sons, namely, Hugh, Alexander, John, Robert, Joseph and James, or the survivors of them, share and share alike." The bill is filed to restrain the defendant from carrying out of the State, negroes embraced in the clause set forth. To the bill the defendant has demurred. The demurrer raises the question, what estate did Mary Porter derive, under the will of John Porter, in the negro Eliza? We are of opinion that the legacy to her is an absolute one, and, upon her marriage with John Montgomery, vested in him by virtue of his marital rights. The limitation over is too remote.

It is a general rule of the common law, that a limitation over, after an indefinite failure of issue, is too remote and the limitation void: because it cannot be said that an indefinite failure of issue will occur within a life or lives in being and twenty-one years after: The general rule however, will be controlled by the intention of the testator, if from the context, it can be plainly seen, that he used the words in the restricted sense, of issue living at the death of the taker of the first estate.

A work written by Mr. Wade Keyes, of Alabama, on chattels, has recently made its appearance at our bar, where all the doctrine upon this subject is stated and the various cases are lucidly arranged and commented on. At page 138, he arranges, into four classes, the cases in which the general rule is controlled by the intention of the testator. The first is, where the failure of issue is combined with an event personal to the donee; as dying without issue and *unmarried*. The second,

where words or phrases are used in the context, which, of themselves, restrict the failure within the prescribed limit. The third class, is where the subject of the gift, necessarily precludes the idea, that any other but a restricted failure, was intended by the donor. The fourth is, where a restriction is raised from the nature of the estate given over by the limitation.

Under these various classes, are arranged the different cases cited by him. This writer, under the second class, observes, that a bequest over to the survivor of *two* persons, after the death of one of them without issue, furnishes the presumption that the testator used the words in their limited sense, and the limitation is not too remote, for it will be intended that the survivor was meant, individually and personally, to enjoy the legacy.

Here the bequest is to Mary Porter, and if *she* die without issue, then over to his six sons. No one of the sons takes any interest in the slave, in the first instance, and the legacy is strictly to a dying without issue of Mary Porter, which the common law declares too remote. The time of her death is uncertain, and she may live many years. We see nothing in the context of this legacy to show that the testator did intend it in the restricted sense.

We are of opinion that the limitation over is too remote, and that Mary Porter took an absolute estate in the negro Eliza, which passed to her husband. In the judgment of the Court below there is error.

PER CURIAM. The demurrer is sustained and the bill is dismissed with costs.

HARVEY BARNETT *against* JOHN WOODS.

It is no objection to the jurisdiction of the Court of Equity in matters of fraud that the thing fraudulently acquired was only worth $20.

Pre-emption rights, secured to persons residing on Cherokee lands under the

Act of 1851, which have been passed on by the agent of the State, and a certificate granted by such agent, for the same, may be transferred to a non-resident for a sufficient consideration, and such purchaser will be protected in this Court against a fraudulent invasion of his rights.

A bill is not multifarious because it alleges several grounds in support of the same claim.

CAUSE removed from the Court of Equity of Cherokee County.

Williams, for plaintiff.
J. W. Woodfin, for defendant.

NASH, C. J. By the 7th section of an act of the General Assembly, passed in the year 1850, it is enacted, that "whereas many poor persons, being destitute of homes, have (also) settled upon the unsurveyed lands in the County of Cherokee, &c., all persons who, prior to the first of January, 1851, resided on said lands, or had made any improvements thereon, which add value to the land, shall be entitled to a pre-emption privilege to one hundred acres, to include their improvements, &c., and upon making satisfactory proof to the agent of the Cherokee lands, that he or she is entitled to the pre-emption privilege, within the meaning of this section of the act, it shall be his duty to issue a certificate to such person claiming the pre-emption privilege, setting forth the location of the hundred acres claimed; and upon such certificate, it shall be competent for the persons entitled to the pre-emption privilege, to have the said lands surveyed, at his or her own expense, &c., to include his or her improvements, &c., and upon payment being made to the agent of Cherokee lands of one-fourth of the price of the land, and upon entering into bonds, with two or more sureties, to be approved by the agent, payable to the State in three annual instalments, for the remaining three-fourths, to issue, to the said purchasers, certificates of the purchase, setting forth the number of the tract, the district in which situated, the number of acres and the price sold for." Under this act, the plaintiff alleges he was entitled to a pre-emption right to the land set forth in his bill, and duly

obtained a certificate from Jacob Siler, who was the agent of the State for Cherokee lands, which in all things pursued the requirements of the 7th section of the act of 1850–'51, and under it had the one hundred acre tract surveyed, on the waters of Long-Bullet creek, in district No. 2, including his improvements, and made return thereof to the office of the Secretary of State. The land as described by the surveyor, in his survey, is as follows: "Beginning on a small hickory on the State line, and runs north one hundred poles to a small hickory in a rich hollow, thence east one hundred and sixty poles to a black oak on the line of John Wood's land, thence south with said line to a stake on the State line, thence west with the State line to the beginning, containing one hundred acres; the whole of the purchase money amounting to $20 was paid. The bill charges that, at the time the plaintiff obtained from the agent of the State, Jacob Siler, his pre-emption certificate, that the defendant John Wood was present and opposed its being granted, and that the defendant subsequently obtained from the said State agent, liberty to take up and locate a hundred acres of land, to be located near to and adjoining the improvements of the plaintiff, and that the defendant fraudulently procured a survey to be made under his certificate, including the improvement of the plaintiff and has procured a grant for the same. The defendant, Woods, took possession, and the plaintiff brought an action of ejectment against him and failed, the legal title being in said Wood. The bill prays that the defendant may be decreed to convey the land to the plaintiff and for an account. The act further authorises the purchaser of a pre-emption right to bring an action of ejectment to eject those settling on the land.

To this bill the defendant has filed a demurrer, in which several causes of demurrer are assigned. The first is, that the price of the land at twenty cents an acre, is only twenty dollars, a sum, which by the rules of this Court, the Court will not take jurisdiction of.

The answer is, the rule is confined to a money demand and

the bill is not brought to recover money, but the land itself, and for an account of rents and profits.

The second cause of demurrer is, that, by the act referred to, occupants alone are entitled to pre-emption rights, and that the bill alleges that the plaintiff had purchased from one William Shuford, his improvement. There is nothing in the act of 1851 which forbids an individual, who settled down on the Cherokee lands and made an improvement thereon, from transferring to another person, for a sufficient consideration, his rights arising under his occupancy, and of transferring that occupancy itself to his assignee. From the statement of the bill, we are authorised to presume that the plaintiff took possession of the improvement made by Shuford, and was, therefore, literally an occupant. The object of the act was to induce persons to occupy and settle those refuse lands, by securing to those hardy pioneers who went upon it and actually made an improvement on it, the fruits of their labor. Whether therefore the pre-emption right was granted to Shuford or to the plaintiff, the object of the act was equally obtained.

But again, it may well be taken, that the law has made the State's agent of the Cherokee lands, the judge in deciding whether an applicant has brought himself within the provisions of the act, and the defendant did appear before Mr. Siler and contested the right of the plaintiff and we have no doubt, upon the ground stated in the demurrer, upon the above point; however we express no opinion.

The third ground of demurrer cannot be sustained. The bill is not multifarious. The allegation that the defendant's grant was obtained in fraud of the act of 1851 is only the assignment of an additional cause why that grant should not be suffered to be in the way of plaintiff, in procuring a good legal title to his pre-emption right. A bill is multifarious where it combines distinct claims against the same defendant, or where it unites in the same suit, several defendants, some of whom are unconnected with a great portion of the claim. Multifariousness of the first kind, sometimes called a misjoinder of claims, is *where the plaintiff has several distinct claims*

against the same defendant, and prays relief in a single bill in respect of all. But the rule being one of convenience only, is not absolutely binding, and may be dispensed with, if the claims be so far connected that a single suit is more convenient, Adams' Eq. 309–'10. Here the plaintiff has no *claim* upon the defendant, for his violation of the law in surveying his land fraudulently. That is a claim belonging to the State, and which, as before remarked, is only suggested that it may be removed out of his way, and a decree procured in his favor upon the main point, which is his laying his grant upon land to which he knew the plaintiff was equitably entitled.

It was further alleged on the hearing that, under the act, the plaintiff had a clear right to sue at law. The act, in giving this right, was intended to operate against mere occupants without title; here the defendant has the legal title, see *Benzien* v. *Lenoir*, 1 Car. L. Rep. 504.

PER CURIAM. The demurrer is over-ruled at the cost of the defendant.

EVE C. SHULL AND OTHERS *against* B. S. JOHNSON, ADM'R. *cum. tes. an.* AND OTHERS.

The expression *all my nephews and nieces* in a bequest, includes nephews and nieces of the *half blood* as well as of the whole blood.

"My nephews and nieces that may be living at, or after my decease" in a will, embraces, as well, those nephews and nieces who are born after the testator's death, as those who were living at his death.

Great nephews and nieces will not be included in such a bequest.

Where there is nothing in a will to show an intention that the legatees shall take by families, they take *per capita*.

CAUSE removed from the Court of Equity of Lincoln County.

This bill was filed by the plaintiffs who are the nephews and nieces of Anthony Shull of the half blood, being the children of his half brothers and sisters against the administrator with

the will annexed, and against the nephews, &c., of the whole blood, to compel the payment of the legacies claimed by them under said will.

The clause of the will under which the several questions involved in the case are raised, is as follows:

Item. "I give and devise to my brothers and sisters children or all my nephews and nieces all the balance of my estate that is left, if there be any left after the above is taken out and discharged as I have above specified."

"All my goods and chattels, if I have any at my decease, to be sold to the highest bidder, and the money collected, if it can, and all my debts, dues, notes and accounts that is coming to me, that can be got or be collected, or as it can be collected, and to be equally distributed amongst my nephews and nieces, that may be living at or after my decease, and my executor is not to pay over to any of them their part until they came of age, or have chosen and have a guardian legally appointed by law to pay it over to."

The executor named in the will having declined to qualify, the defendant, Johnson, took out letters of administration with the will annexed. His answer sets forth the facts upon which the several questions treated of in the opinion of the Court arise, and he prays the advice and protection of the Court of Equity in making payment of the legacies due and arising under the clauses set forth.

The other defendants answer, and refer to and rely upon the answer of the administrator.

The cause was set down for hearing upon the bill, answers, and exhibit, and sent to this Court by consent of parties.

Lander, for the plaintiffs.
Thompson, for the defendants.

Battle, J. There is no serious difficulty in either of the questions arising upon the construction of the will of the testator, which the pleadings present for our decision.

1. By the clause "I give and devise to my brothers' and

sisters' children, or all my nephews and nieces all my estate," &c., the testator manifestly intended to include his nephews and nieces of the half, as well as of the whole blood. They certainly answer the description; for if they are not nephews and nieces what are they?

2nd. The clause "my nephews and nieces that may be living at or after my decease," not only embraced those who were living at the testator's death, but also operated as an executory devise to all those who might be born afterwards. Such an executory bequest is certainly a valid one, and in the present case, no other construction will give effect to the words living "after my decease." Each nephew or niece who has been born since the death of the testator, or who may come into existence hereafter, is, and will be entitled to a share of the estate, and the executor in paying over the shares, respectively, of the present claimants, will have a right to demand a bond for refunding what may be necessary to pay the portion of such nephews and nieces as may hereafter be born. It is hardly necessary to say that great nephews and nieces will not be embraced.

3rd. The legatees will take *per capita* and not *per stirpes*. The testator has made no distinction of families, and the nephews and nieces all take equally, share and share alike.

The plaintiffs are entitled to a decree for an account, if they desire it, and for the payment of their legacies upon the principle of division herein before set forth.

PER CURIAM. Decree accordingly.

THOMAS K. CURETON *against* JAMES MOORE, ADM'R.

A husband's estate, after his death, is not liable for the debts of his wife contracted by her *dum sola*; and although such estate may get the very property for which the debt was contracted, and [the wife being insolvent] a surety may have to pay the debt, yet such surety has no relief in Equity.

Where the case presented in a bill is one that merely involves a question of legal title, although it sets forth circumstances of hardship, a Court of Equity cannot interfere.

Cause removed by consent from the Court of Equity of Union County.

Jane Cairnes, a feme sole, who resided in Lancaster District, S. C., bought of Jesse Harris a negro slave by the name of Anne, at the price of $150, and for a part of the price thereof, gave a note for $100 with the plaintiff as surety. Separate actions were brought on this note against her and the plaintiff, in the Court of Common Pleas of Lancaster District, and at October term, 1846, of that Court, judgments were obtained against them severally. Writs of *fieri facias* were taken out on these judgments, and placed in the hands of the Sheriff of that District, by which, as is alleged in plaintiff's bill, under the law of South Carolina, *liens* were created upon the said slave.

The bill further alleges that early in the year 1847, Jane Cairnes married the defendant's intestate, Milton Moore, who lived in Union County in this State, that "in order to defraud the plaintiff in that judgment as well as to oppress the plaintiff in this suit, the said Milton Moore, well knowing of the existence of these executions and their liens upon the slave, Anne, secretly and clandestinely caused her to be removed from the District of Lancaster, S. C., into the County of Union in this State."

Milton Moore died in the fall of 1847, and had had possession of the slave, Anne, from the time of her being brought into Union County, up to the time of his death, and she then went into the possession of the widow Jane.

Afterwards, by the connivance of the widow, (as is stated by the defendant) the slave in question was carried back into Lancaster District, and at the instance of the plaintiff Cureton, was seized under the execution against Jane Cairnes and regularly sold by the Sheriff of that District, when the plaintiff bought her at the price of $161.

Subsequently the defendant James Moore, who had adminis-

tered upon the estate of Milton Moore, brought an action of trover in the Superior Court of Union County against the plaintiff Cureton and the widow Jane, jointly, for the conversion of the said slave, and recovered as damages therefor the sum of $295, and the costs of suit, and it is alleged, in the plaintiff's bill, that the administrator James was about to proceed to the satisfaction of this judgment against him.

The prayer of the bill is for an injunction against this judgment and for general relief.

The defendant answered at the return term; replication was entered and commissions ordered, under which, proofs were taken, but as the opinion of the Court relates entirely to the case as alleged in the plaintiff's bill, it is deemed unnecessary to set forth more than is contained in that.

Wilson, for plaintiff.
Osborne, for the defendant.

Pearson, J. We are unable to see any ground upon which the plaintiff is entitled to the aid of this Court. If the lien upon the slave subsisted and remained in force, notwithstanding the marriage of Jane Cairnes, and the removal of the slave into this State by her husband, then the plaintiff, by his purchase under execution sale, acquired a good title and had a full defense to the action at law. If, on the contrary, the lien had lost its force, then the plaintiff acquired no title by his purchase under the execution (the title having vested in the husband) and consequently had no defense to the action at law. So taking it in either point of view, it is a mere question of legal title. There is no equitable ingredient presented by it, and no ground upon which a Court of Equity can interfere.

The idea, that if one, who is the surety of the purchaser of a slave, is forced to pay the purchase money, he has an equity to follow the slave for exoneration in the hands of the administrator of the husband of the purchaser, although suggested, was not pressed on the argument. Sometimes, by the death

of a husband, who has by his marital rights acquired the property of the wife, the fact that his personal representative is not liable *for the debts of the wife* contracted *dum sola*, presents what is called a *hard case:* but a Court of Equity can no more relieve against "hard cases," unless there be some ground of equity jurisdiction, than a Court of Law; for both courts act upon general principles. Equity, as well as Law, is a science, and does not depend upon *the discretion* of the court entrusted with equity jurisdiction, or the vague ideas that may be entertained as to "hard cases."

The fact that the husband lived in this State, and by bringing the slave over the line, had, in some way, affected or interfered with the rights of the plaintiff, so that he had been unjustly subjected to a judgment in the action at law, is vaguely stated, but how that gives any ground for the interference of a Court of Equity, we are unable to perceive.

Per Curiam. Bill dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE SUPREME COURT OF NORTH CAROLINA.

AT RALEIGH.

DECEMBER TERM, 1855.

RICHARD BROTHERS AND OTHERS *against* ISAAC S. HARRILL, ADM'R.

To convert a deed, absolute upon its face, into a security for a debt in the nature of a mortgage, so as to give a right to redeem, besides parol admissions that the deed was intended as a mere security, there must be facts, *dehors* the deed, inconsistent with the idea of an absolute conveyance, and proof of fraud, oppression, ignorance, or mistake, so as to account for the conveyance being absolute when such was not the intention.

Although there be some facts, *dehors* the deed, that tend to show a trust, yet if there be other facts perfectly consistent with the idea of an absolute sale, and the repugnancy between the trust sought to be established, and the terms of the written instrument, is still unexplained, a Court of Equity will not interfere with the legal rights of the party by an injunction.

An injunction to stay the execution on a recovery at Law in an action of detinue, is as much an *ordinary injunction*, as one to stay an execution on a judgment for money. In both instances they come within the rules governing ordinary injunctions, unless *irreparable injury* be alleged.

APPEAL from a decree of the Court of Equity of Gates County continuing an injunction to the hearing, by his Honor, Judge SAUNDERS.

The facts of the case sufficiently appear from the opinion of the Court.

Heath, for the plaintiffs.
Smith, for the defendant.

Pearson, J. The distinction between an "ordinary injunction" to stay an execution upon a judgment at Law, and a "special injunction" to prevent irreparable injury, is settled.

In our case, the defendant has established his title to the slaves by a judgment at Law, and the plaintiff seeks to stay execution upon an alleged equity; there is no suggestion of irreparable injury, and the question now before us is, shall the legal owner be allowed to take possession of his slaves, or must he be required to permit them to remain in the possession of the plaintiffs, until their alleged equity is passed upon? In other words, this is "an ordinary injunction," in regard to which the rule is, "the injunction is dissolved, as a matter of course upon the coming in of the answer, unless the equity is confessed, or, (according to our practice), unless the answer is defective in not responding to a material allegation, or is unfair or evasive, so that exceptions to it would be sustained." *Lloyd* v. *Heath*, Busb. Eq. 39; *Capehart* v. *Mhoon*, ib. 31.

His Honor in the Court below, sends a statement as follows: "The bill charges that in 1849, complainant sold to the intestate six slaves, and executed to him separate bills of sale; that the consideration was $13,000, for which the deceased executed his note for $500, with the understanding that the deceased was to sell two of the slaves, pay off the complainant's debts, and then re-convey the other slaves to the children of complainant. It further charges, that complainant was much embarrassed and of dissipated habits, that intestate was an officer at the time, and had claims in his hands for collection against complainant. It further charges, that intestate did sell two of the slaves for $900, paid off the debts, and induced complainant to give up the note of $500, on the assurance that intestate had or would execute the deeds to complain-

ant's children; that complainant retained possession of the slaves, and that the administrator had sued and recovered judgment at law for value of slaves, and thereon intended to sue out execution. Prays for an injunction, &c., &c.

"The administrator answers; admits complainant's being indebted; that the intestate, an officer, had claims against complainant. He admits sale of negroes at the price of $13,000, the note of $500, the bills of sale, that they were not recorded during life of intestate, and that complainant retained possession of the slaves, but he says the sale was absolute; that the note of $500 was given in payment and not as security; that the intestate sold two of the slaves at $900; has paid off debts of complainant to at least the sum of $13,000, the vouchers for which were given up to complainant; says nothing as to note of $500; admits complainant's being greatly in debt, that he was subject to intoxication, but sane at the sale and settlement; and admits that intestate had said it was his intention to re-convey negroes to children of complainant as a gift, and not under the contract, &c., &c.," and concludes, "Considering the foregoing facts, it is ordered that the injunction be continued to the hearing, &c." If his Honor considered this as a "special injunction," where the bill is allowed to be read as an affidavit on the part of the plaintiffs, he was in error, for there is no suggestion of irreparable damage, and the defendant had established his right by a judgment at law. This distinction is based on a general principle, and the rule applicable to "ordinary injunctions," is not confined to cases where the collection of a debt is enjoined, but embraces all cases where the defendant in Equity has established a right by a judgment at law. *Reed* v. *Kinnaman*, 8 Ire. Eq. 13, was decided upon its "peculiar circumstances;" and to prevent misconception, that fact is particularly noticed in *Lloyd* v. *Heath*, *supra*. We are consequently at a loss as to the sense in which his Honor uses the word "facts" in the statement sent. At this stage of the proceeding, (there being no proofs,) only such matters are to be considered *facts*, as are admitted

by the answer; the other matters set out in the statement, are allegations merely.

After a careful perusal of the bill and answer, we do not concur with his Honor in reference to the facts and allegations. Nor do we concur in his conclusion at this stage of the proceeding.

The *facts* are, in 1849, the plaintiff Richard, being much in debt and of dissipated habits, executed to defendant's intestate, who was a constable, and had in his hands for collection, several debts against him, three bills of sale of the same date, all absolute on their faces, without any condition or trust, and with general warranty. One for Willis and Augustus, in consideration of $800, the receipt whereof is acknowledged; one for Maria and Minerva, in consideration of $300, the receipt whereof is acknowledged; and one for Nat and Ceney, in consideration of $200, the receipt whereof is acknowledged; and the intestate of defendant executed to plaintiff Richard, a bond for $500, and undertook to pay his debts to an amount equal to the value of Willis and Augustus, it being supposed that these two slaves could be sold for an amount sufficient to pay his debts. Afterwards, the defendant's intestate sold these two slaves for $900, which he applied to the payment of the debts; the other slaves were left in the possession of the plaintiff, Richard, who still has them in possession. The bills of sale were not registered in the life time of the intestate, who died in 1854, when they were found among his papers. The defendant administered upon his estate, had the bills of sale registered, and obtained against the plaintiff, Richard, a judgment in an action of detinue.

The plaintiffs allege that the slaves were not *sold* by the plaintiff Richard to the defendant's intestate, and although the bills of sale are absolute on their faces, yet in fact, the intention and understanding was, to pass the title to defendant's intestate in trust, to make sale of as many of the slaves as would pay the debts, and then to re-convey such of them as were unsold, and any surplus that might remain of the price of those that should be sold (after paying all the debts) to the

children of Richard; that the bills of sale and the $500 note, were all drawn and executed at the instance of defendant's intestate, in whom the plaintiff Richard, had the most implicit confidence. They further allege that after the sale of Willis and Augustus, the defendant's intestate induced the plaintiff Richard, to deliver up to him the note of $500 upon an assurance, "that he had destroyed the bills of sale, and that they would never be again seen by the said Richard or any one else."

There is no allegation, as is set out in the statement of his Honor, that the $500 note was surrendered "on the assurance that intestate had, or would execute, the deeds to complainant's children."

The defendant positively denies that there was any such understanding, confidence or trust; on the contrary, he avers that the slaves were sold by the plaintiff Richard, to his intestate, absolutely and without any qualification, for the consideration of $1300, which he avers was a full and fair price, and was paid by his intestate in the discharge of debts of the plaintiff Richard, which fact he avers as of his own knowledge; because he says he was present when his intestate and plaintiff Richard had a settlement, and his intestate produced vouchers for debts paid to an amount exceeding $1300. These vouchers were judgments, notes, &c., against the plaintiff Richard, which had been paid by defendant's intestate, as appeared by the receipts endorsed, and at the conclusion of the settlement, these vouchers were delivered up to plaintiff Richard, who was cool, and seemed to understand the business. He says nothing further in regard to the $500 note, leaving it to be inferred, that it was included in the vouchers amounting to $1300 and upwards, which were delivered to the plaintiff Richard; but he admits that he heard his intestate express the intention to sell the slaves, and with the proceeds to pay off the debts of the plaintiff Richard, and to apply the surplus, if any, to the use of his children, who are the other plaintiffs; "but it was never spoken of by him as an obligation or duty growing out of his purchase, but only as a purpose of his own;

afterwards, however, one of the slaves was badly injured by being burned, and respondent heard his intestate say there would be nothing left to bestow upon the children. Respondent understood these as no other than gratuities intended by him."

It is settled, that to convert a deed, absolute upon its face, into a security for a debt in the nature of a mortgage, so as to give a right to redeem, besides parol admissions that the deed was intended as a mere security, there must be "facts dehors," inconsistent with the idea of an absolute conveyance, and proof of fraud, oppression, ignorance, or mistake, so as to account for the conveyance being absolute on its face, when such was not the intention. Under this doctrine the *party* is allowed to set up in himself an equity to redeem against a deed absolute on its face; whether his *children* can be allowed to set up a trust, so as to entitle them to call for a conveyance, has never been decided. That would seem to violate the maxim, a deed shall not be added to, varied or explained by parol proof. Upon this, however, we are not at liberty, now, to express an opinion. As the case stands there is no admission of any such trust in opposition to the face of the deed, and there are no *facts*, *dehors*, inconsistent with the idea of an absolute purchase. True, there are *three bills of sale*, when *one* would have answered the purpose; it is also true, that the vendor was allowed to retain possession of all the slaves except two; and it is also true that the vendee, the intestate, had expressed an intention to *bestow*, *as a gratuity*, upon the children of the vendor, any surplus that might remain after paying off his debts; but on the other hand, the price paid was a full and fair one, and there is a positive amount of debts paid, and the surrender of vouchers *upon a settlement* to an amount sufficient to cover the value of the property. In this stage of the case, therefore, there is no reason why the law shall not prevail, and the legal owner be allowed to take possession of his property, subject to any equity that the plaintiffs may hereafter be able to establish.

The injunction ought to have been dissolved.

Per Curiam. Interlocutory decree reversed.

HENRY W. ADAMS, ADM'R. OF J. M. COILA, *against* JOHN A. ADAMS AND OTHERS.

Where a testator, having a brother and sister his next kin, the brother having two daughters, and the sister three sons, devises in several preceding clauses, estates to the brother and to the sister, and to the children of each respectively, and gives to the brother and sister no other estate or interest in any part of the will, and concludes with a residuary clause as follows: "the rest and residue I wish to be equally divided between the children of my brother, J. S. C., and my sister, N. A. A." *Held*, that the words "the children of" are to be understood in the last sentence of the clause; that both families of children take *per capita*; and that N. A. A. takes no interest under that clause.

CAUSE removed from the Court of Equity of Beaufort Co.

This was a bill filed by Henry W. Adams, the Adm'r. with the will annexed of John M. Coila, and as the husband of Nancy A. Adams, against the legatees under said will, praying the advice of the Court of Equity as to the construction and the proper manner of executing the provisions of the will. The following is a copy of the will: "Item 1st. I lend unto my sister Nancy Amanda Adams, during her natural life, one improved lot in the town of Bath, N. C., known in plan of said town, as lot No. 31, and at her decease, I give the same to her son, William Adams, forever.

"Item 2. I lend to my sister Nancy Amanda Adams, during her natural life, one unimproved lot in the town of Bath, N. C., known in the plan of said town as lot No. 29, and at her decease I give the same to her son, William Adams, forever.

"Item 3d. I lend to my sister Nancy Amanda Adams one tract or parcel of land lying and being on Chicod Creek, Pitt County, N. C., adjoining the lands of Nathaniel Harding, James Paramore and others, during her natural life, and at her decease I give the same to her lawful children forever.

"Item 4. I lend to my sister Nancy Amanda Adams one tract or parcel of land lying on Chicod Creek, Pitt County, N. C., adjoining the lands of Henry Galloway, John Boyd

and others, during her natural life, and at her decease I give the same to her lawful children forever.

"Item 5. I lend to my brother Jahleel Smith Coila, one tract or parcel of land lying at the head of Duck Creek, Beaufort County, N. C., adjoining the lands of John Pilly, Sr., Robert Latham and others, during his natural life, and at his decease I give the same to his lawful children forever.

"Item 6. I give to my nephew, William Adams, three hundred dollars, which sum I wish to be judiciously expended in his education.

"Item 7. The rest and residue that I may die possessed of, I wish to be equally divided between the children of my brother Jahleel Smith Coila, and my sister Nancy Amanda Adams."

The children of Mrs. Adams are John A. Adams, William A. Adams, and Henry E. Adams, who are infants, and are made parties to this bill, defending by their guardian *ad litem.*

The children of Jahleel Smith Coila are Ellen and Rosanna Coila, who are also infants, and are made parties defendant, defending by their guardian *ad litem.*

The questions propounded in said bill are:

1st. Whether Nancy Amanda Adams takes anything under the seventh clause of the above will.

2nd. In case she is entitled, what proportion is she entitled to? Whether one half or one third?

The defendants, by their guardians, answered, professing no knowledge of the matter set out in the will and exhibit, but submitted their interests to the judgment of the Court.

The cause was set down for hearing on the bill, answer and exhibit, and removed to this Court by consent.

Donnell, for plaintiffs.

No counsel appeared for defendants in this Court.

Nash, C. J. The bill is filed to procure a construction of the 7th section of John M. Coila's will. The will contains

seven items. The first five are of the same character as to the interest devised. The sixth is a pecuniary legacy, and the seventh disposes of the residue of the testator's estate. It is as follows: "The rest and residue that I may die possessed of, I wish to be equally divided between the children of my brother Jahleel Smith Coila, and my sister Nancy Amanda Adams." The difficulty is to ascertain who are the persons entitled to this residue. As to the children of Jahleel Smith Coila there is no doubt as to their right, and the only question for our decision is, is Mrs. Nancy Amanda Adams entitled to any interest in it? or are her children entitled to it? The leading rule in the construction of wills, is to ascertain the intention of the testator, which must govern, if not contrary to law; and to find this intention, the whole will must be examined, and it becomes often necessary to do so. If this rule be observed in this case, the intent of the testator is made plain. He had a brother, Jahleel Coila, and Mrs. Adams, his sister, to whom he devises land in the five first clauses of the will, and in each case gives to them but a life estate, the remainder being devised to their children. From some cause he does not give any of his real estate in fee to either his brother or his sister, and their children appear to be the great objects of his bounty. In the first and second clauses of the will, William Adams, the son of Nancy A. Adams, is the devisee in remainder; in the 3d and 4th all the lawful children of Mrs. Nancy A. Adams are the devisees in remainder. In the 5th clause a similar disposition is made of the remainder of the land devised to the brother. Throughout these dispositions of the land property, devised to his brother and sister, it is obvious from some cause or other, it was not the intention of the testator to put it in their power to defeat his intentions as to their children. In the 7th clause, the one we are considering, the testator leaves no doubt as to the children of his brother; the brother is to have nothing of the residue; and though not equally clear as to Mrs. Adams, it is sufficiently so to show the intention that his sister should take nothing, but her children should take. Why there should be a difference in this

clause, while in every other there is a perfect equality in the nature of the interest devised to each of them, is not obvious. The plaintiff and his wife take nothing of the residue, but it is to be divided equally *per capita* between the children of the brother, J. S. Coila, and those of the sister, Mrs. Nancy Amanda Adams.

PER CURIAM, Decree accordingly.

DUNCAN CROMARTIE AND OTHERS *against* JAMES ROBISON AND OTHERS.

A bequest of "all my slaves" to the testator's wife, during her life, and then "I give and bequeath said slaves (with the exception of those I acquired by intermarriage with her, those that I received in the division of my father's estate—old Joe and Ferryman Jim) to W. J. and E.," with this clause in connection, "My will and desire is, that the hereinbefore excepted slaves be hired out, &c., to raise a fund for their transportation to Liberia," accompanied with a strict injunction upon the executor to *raise the means* for their transportation, was *held* to mean that the intention of the testator was to liberate all the slaves that he got by his marriage, and their increase since his marriage; and all the slaves he received from his father's estate, and the increase of such since he received them, and old Joe and Ferryman Jim.

CAUSE removed from the Court of Equity of Bladen County.

James J. McKay died in September, 1853, having made his last will and testament, which was duly admitted to probate in the County Court of Bladen, where the testator was domiciled. William J. McKay was appointed executor therein, who renounced the office. His wife, Mrs. Eliza Anne McKay, was also appointed executrix, but she died before the death of her husband. The office of executor having therefore become vacant, the defendant, James Robison, was appointed by the said Court, administrator with the will annexed, and possessed himself of all the estate and assets of the testator, among which was a large number of slaves, some of

whom he had obtained by marriage with the said Anne Eliza, some from the estate of his father, and others he had acquired by purchase. The questions raised in this case grow out of the following provisions of the will: "9th. I give and bequeath to my wife, E. A. McKay, my household furniture, and other articles of perishable property, absolutely, to be disposed of at her pleasure; and give and bequeath to my said wife *all my slaves* during her widowhood; on the termination of her widowhood, I give and bequeath said slaves (with the exception of those I acquired by intermarriage with her, those that I received in the division of my father's estate, old Joe and Ferryman Jim) to William J. McKay, John L. McKay, and Emily S. Kemp, to be equally divided between them; but it is my will and desire that the share of slaves hereby bequeathed to Emily S. Kemp, belong to her during her life, and after her death, shall be equally divided among her children."

"10th. It is my will and desire that the slaves herein before excepted, be hired out by my executors for two or three years, in order to raise a fund for their transportation to the Colony of Liberia; and as soon as that object can be effected, my executors are hereby strictly enjoined to take the requisite means, for the transportation of said slaves to Liberia, under the direction and patronage of the Colonization Society."

Elizabeth A. McKay, John L. McKay and Emily S. Kemp, the legatees above mentioned, all three, died in the life time of the testator.

Emily S. Kemp left, her surviving, several children, who are parties plaintiff.

John L. McKay left a daughter, Mary Anne, who intermarried with Duncan Cromartie, and another daughter, Eliza P. McKay, who are parties plaintiff also.

The bill is filed against the administrator with the will annexed, for an account, and for the payment of the legacies according to the will; and it is contended, that only the slaves that came to the testator originally, by his marriage, and those that originally came from his father's estate, without the in-

crease of either class, embrace the persons to be manumitted.

By an amendment of the pleadings, the Attorney General was made a party defendant, to protect the interests of the persons entitled to their freedom, and of the Colonization Society; and he insisted that all the individuals composing the classes falling within the exception, and their increase, are entitled to emancipation.

James Robison, the administrator, married Eliza, one of the daughters of Emily S. Kemp, and his answer as administrator, also that of himself and wife, are filed. He sets forth the several classes of the negroes as above specified, with the names of each, and their increase; also the names of those not contained in the exception, and states that all the slaves were hired out till the first Monday in February, 1856, that is, for two years, and he states the amount for which they hired. He admits there are difficulties in the way of arriving at the intention of the testator in respect of the slaves entitled to their freedom, and desires the advice and instruction of the Court on the subject; submitting to perform such decree as the Court may make in the premises.

The cause was set down for hearing on the bill, answer and exhibits, and sent to this Court by consent.

Reid and *McDugald*, for the legatees.
Shepherd, for the administrator.
C. G. Wright, for the Colonization Society and the slaves.

Pearson, J. The counsel on both sides supposed that *Caffee* v. *Davis*, 1 Jones' Eq. 1, had an important bearing upon our case. In that they are mistaken. Ours is a mere question of construction, i. e., what slaves did the testator intend to set free? So, we are not at liberty to enter the broad field of discussion, or go into an examination of the many cases cited in support of, and in opposition to, *Caffee* and *Davis*. It is proper, however, to say, we think the decision in that case can be sustained, both upon the *reason of the thing*, and by the analogy of the cases in regard to the increase of female

slaves, whereby the principle is settled, that the increase does not, as in case of other chattels, belong to the owner of the mother at the birth, but passes with her to the remainderman, and by parity of reason, passes with her into a condition of freedom. When the title to herself is given to her, in other words, when she is set free after the determination of a particular estate, the increase during that time, goes with her, because the taker of the first estate is excluded by the rule above stated in regard to slaves.

We think proper also to say, in putting a construction upon the will now before us, we have a single eye to the intention of the testator, without reference to the notion that Courts should favor charities, and lean *in favorem libertatis;* for, however humane we may suppose the feeling that prompts, it is not established that public policy favors the emancipation of our slaves; and although the principles of the common law look with favor upon the transition of a bondsman, or villain, to the state and condition of a *free white man*, yet very different considerations may be involved, when the question is between the condition of a slave and that of a *free negro.*

But, as we have said, ours is a question of construction. The testator seems to have divided off his slaves into three classes: those acquired by his marriage, those received from his father's estate, and those that he had bought. His intention was to set free the first two classes, not as individuals but as stocks, answering to a general description, so as to include the whole,—young as well as old—child as well as parent, all together, as classes, comprising the *family* negroes of his wife as well as of himself. Hence, in referenc to these two classes, he sets out no names; but when he comes to the third class, and wishes to make an exception out of it, he names "old Joe and Ferryman Jim." They are to be set free as exceptions out of a class, and are particularly named. In regard to the others, they are to be set free as classes or stocks under a general description.

This conclusion is supported by several other considera-

tions, which will suggest themselves to every one who peruses the will.

Although there may be a difference of opinion in regard to the question, whether it is not a mistaken charity to turn a slave into a free negro, certain it is, the testator professes and supposed he was doing a humane act. An intention to set the whole *class* free is consistent with this idea; for then, grand-parents, parents and children, all go together. But, an intention to liberate only the old negroes, taken in connection with the words "my executors are hereby *strictly enjoined* to take the requisite means for the transportation of said slaves to Liberia, under the *direction* and *patronage* of the *Colonization Society*" is a mockery!! A decent regard for the memory of the testator, forbids any such supposition. The laws of our State allow old negroes who are emancipated for meritorious services to remain here. In the name of humanity, if the intention was to liberate only the old negroes, why did the testator require them to be separated from their children and grandchildren; to be torn away from the place "where they were raised," and sent as exiles to Liberia? Such could not have been the intention. The purpose was to direct all the *family negroes*, in the largest sense of the words, to be sent to Liberia; and in so doing, he intended to aid, and take part in, the great and philanthropic purposes of the noble society to whose patronage he committed them.

The strict injunctions given to his executors in regard to this bequest, besides tending to show that it was looked upon, and had more importance attached to it than the emancipation of a few old negroes would have called for, suggests this further consideration: William J. McKay, a brother of the testator, is one of the executors, and under the will is entitled to a third part of all the slaves except those who are to be emancipated; so, he had a direct interest in the question; and as the fund was a very large one, it may be the testator deemed it proper to give this strict injunction, for fear that the interest of the executor might tempt him to disregard his duty; whereas

such special instructions would scarcely have been given if the fund had been of small value.

Again, the slaves who are to be emancipated are directed to be hired out for two years, so as to raise a fund to pay the expense of transportation. The hire of the whole will produce a fund adequate for that purpose; but the hire of the old negroes will scarcely support them during the two years.

Again, when he made the will, the testator supposed his wife might out-live him, yet he gives her a life-estate in all the slaves, as well those who are to be set free, as those who are disposed of as property. If the old negroes only were to be sent to Liberia, why keep them here until the death of his wife? The interposition of a life-estate is inconsistent with the supposition, that the old negroes, personally, and as individuals, were the objects of the testator's bounty, (many of whom would probably not live to enjoy it,) but agrees very well with the supposition that the intention was to include *all* of both stocks; so as to mean "after my wife and myself are both dead, I intend to liberate all our family negroes; and as the descendants are to be free, my purpose will be effected, although some of the old ones may die before the period arrives."

The conclusions which Courts are enabled to form, in cases like the present, in regard to the intention of the testator, it must be confessed, are, to some extent, mere conjectures; being inferences from other parts of the will, or from its general scope, pressed into service to show the meaning of an ambiguous expression. For this reason it is a relief to find that our conclusion is supported by a decision of this Court in a case where the words of the will were nearly the same as those we are now considering. *Long* v. *Long*, 2 Murph. 19. The testator married in 1794, and acquired several slaves by his wife. She had issue, two daughters, and died. The testator died in 1809. His will contains this clause, "I give and bequeath to my two daughters all my negroes, together with the future increase which came by my dear departed Rebecca, their mother." It was held, that the daughters were entitled to all

the negroes which were born of that stock, after the testator received them. The Court found the words *future increase* somewhat in the way; but conclude, "It appears to the Court that it was the intention of the testator by this clause, to give to his daughters the increase of the negroes which came by his wife. The expression used by the testator, will be understood in common parlance as comprehending the increase. He speaks of the negoes *generally* as stock, without particularlising them by name; which circumstance is favorable to the idea, that as stock is to be diminished by death, so it must be kept up and supported by its natural increase."

It must be declared to be the opinion of the Court, that the clause directing emancipation, includes the descendants of the original stocks.

Per Curiam. Decree accordingly,

JESSE H. CANNADAY AND OTHERS *against* JACOB K. SHEPARD AND OTHERS.

The transfer of an equitable chose in action, to be entitled to the protection of a Court of Equity, must be founded on a valuable consideration.

The compromise of a controversy, wherein the legal owner of a chose in action, supposed he was bound to the performance of an onerous and oppressive contract, when in truth he was not, is not such a sufficient consideration as will entitle the transferree to a decree for a specific performance.

Where the contract sought to be enforced, is hard and oppressive, this Court will not interfere to enforce a specific performance, but will leave the parties to their remedies at law.

Cause removed from the Court of Equity of Onslow County.

The defendant, Jacob Shepard, agreed by parol, to purchase of the plaintiff, Jesse H. Cannaday, a tract of land, described in the pleadings, at the sum of twelve hundred dollars. Cannaday executed to him a penal bond, conditioned to make title for the land on the purchase money's being paid; at the

same time Shepard delivered, in part payment, without endorsement, a bond on the defendants Daniel R. Henderson and Robert Aman, payable to him, Shepard, for four hundred and twenty-five dollars, dated 25th of November, 1845, payable twelve months after date, and gave his own note for the balance of the sum of $1200. Shortly after the trade was made, Shepard became dissatisfied, and earnestly pressed a rescission of the contract, which was finally agreed on, and which took place in this wise: Cannaday gave up to Shepard his note, and also gave him the individual obligation of him, Cannaday, for twenty-five dollars, payable in goods; he also took back the bond which he had given to make title, but insisted on retaining, and did retain, the note for $425 on Henderson and Aman, claiming it as his property, and insisting that it was but a fair equivalent for the damages he had sustained for *vexation, loss of time and expenses.* The plaintiff had not been out of possession of the land; and the whole time, from the original trade, until the rescission of it, was but a few days,—less than a week.

The plaintiff alleges in his bill, that the parol agreement was fairly and deliberately made, and the land sold for not more than its value, and that it was done at the earnest request and solicitation of the defendant Shepard, and very reluctantly entered into by the plaintiff Jesse; that after this trade, he changed the character of his business, and made other arrangements for his employment, maintenance and support in life; that this rescission was thus a great loss to him, and that the four hundred and twenty-five dollar note, minus the twenty-five which he was to pay Shepard, was not more than a remuneration for this *loss of time, vexation and expense.* The bill further alleges, that this note for twenty-five dollars has been since paid by him to the said Shepard, and that the bond on Henderson and Aman was transferred, by delivery, to one Green Cannaday, for a full and valuable consideration, and that the said Green sold and transferred the same, by delivery, to the plaintiff John A. Averitt, without endorsement, in either case; that Averitt brought suit on

this bond against Daniel R. Henderson and Robert Aman in the County Court of Onslow, in the name of the defendant, Jacob K. Shepard, who went forward, in person, and had the same dismissed from the docket; and that Henderson, well knowing the premises, afterwards, on being indemnified by Shepard, paid him the whole of the amount due on the bond.

The prayer of the bill is, that "the defendants may be compelled to perform their contract and agreement, and pay and satisfy to John A. Averitt, the full amount of principal and interest due upon said bond."

The defendants plead the statute of frauds, requiring all contracts concerning land to be in writing. The defendant, Jacob K. Shepard, also answers, and denies that he ever made any legal or valid contract for the land alleged to have been sold him; he says that the bond on Henderson and Aman was obtained from him by Jesse Cannaday when he was very drunk, so much so that he did not know what had become of it, until afterwards informed, and in its place was found by him a paper, which he since has discovered was a title bond for the land, executed by the said Jesse Cannaday; that he did not want the land, and was not able to pay for it, and that $1200 was an exorbitant price for it. He says that he went to Cannaday as soon as he could, after this pretended trade, and insisted on a recantation on account of the fraud practiced upon him, and he was able to get back the note which he gave for the purchase money, and to get a note on said Cannaday, payable in goods, and he delivered back to Cannaday his bond to make title, but he was unable to get back the bond on Henderson and Aman; that this, the said Jesse Cannaday kept, without making him any compensation for it, or giving him one cent of value; that even the twenty-five dollar note, payable in goods, he never paid. He says further, that under these circumstances, he felt himself fully at liberty to dismiss the suit brought by Averitt, in his, defendant's name, and he felt justified in receiving from the obligors in the said bond, and did receive, the whole amount thereof, principal and interest, having first indemnified the said Hen-

derson in paying the same to him. He says further, in his answer, that he does not know whether Green Cannaday paid any thing for the bond in question or not; nor does he know whether Averitt paid any thing to Green; but he does not believe that either of them paid any thing, and believes that this transfer was merely colorable; nor does he know whether either of them had notice of the fraud or imposition practiced on him in the bond's being obtained from him, but he has little doubt that both were fully aware of the fact. As a reason for this belief, he states, that very soon after this transaction, he made public advertisement of the nature of the transaction at the Court-house, and at a neighboring store, and at other public places in the county, and cautioned all persons against buying the bond of which he had been defrauded. He denies that the plaintiff, Cannaday, was in any manner damaged or incommoded by rescinding the pretended land trade, for that it all happened within one week, and that he, Cannaday, retained the possession during the whole time.

There was replication to the answers and proofs taken, and the cause having been set down for hearing, was sent to this Court.

Winslow and *Reid*, for plaintiff.
W. A. Wright, for defendant.

Nash, C. J. The plaintiffs' bill cannot be sustained. The substantial facts upon which the case turns, are not controverted, and are as follows: The plaintiff Cannaday, was the owner of a tract of land, which he contracted to sell to the defendant Shepard, at the price of $1200. Shepard transferred, by delivery to Cannaday, a bond for $425, executed by Daniel R. Henderson and Robert Aman, and executed his bond to the plaintiff Cannaday, for the balance of the stipulated price; Cannaday at the same time executed a bond for title, when the money should be paid. Subsequently, on the application of the defendant Shepard, the parties cancelled the bargain, upon condition that Cannaday should retain the bond of Hen-

derson, and give Shepard his note for $25. Upon this agreement, Cannaday executed and delivered to Shepard, his note for the $25, and surrendered to him, his (Shepard's) note, or bond, and the latter surrendered the title-bond to Cannaday; the latter retaining the Henderson bond. Cannaday transferred the latter bond to Green Cannaday, and he to Averitt, one of the plaintiff's. A suit was brought upon it by Averitt, in the name of Shepard, who, at the return term, appeared in Court and dismissed it. The bill is brought upon the alleged equity of Cannaday, to recover the amount against Henderson and his surety and Shepard; the former having paid to Shepard the amount due, with full knowledge of the claim of Cannaday.

The first enquiry is, what is the equity of Cannaday, admitting for the present, that the contract for the sale and purchase of the land, was valid?

The transfer of the Henderson bond, left the legal title to it still in Shepard. It could be legally transferred only by endorsement. If transferred, however, for a valuable consideration, it would convey to the transferree an interest which a Court of Equity will protect. The bill is one for specific performance; and when such a decree is asked, there must be a valuable consideration to support the equity. Adams' Eq. 79. It is not pretended that any money was paid by Cannaday; but it is alleged that the compromise was a sufficient consideration. The compromise of a doubtful right, is certainly a sufficient consideration to support a contract; but there was here no compromise, properly speaking, but simply a rescinding of a contract upon the condition imposed by the plaintiff Cannaday. The contract of sale between the parties was absolutely void as to Shepard. He had signed no memorandum or note of the contract, either by himself or any other person, (Rev. Stat. ch. 50, sec. 8,) nor did the execution of the bond for title by Cannaday, alter the position of Shepard. The contract, as to him, was void, and he had nothing to compromise. The title to the Henderson bond, both at Law and in Equity, was in him. The plaintiff paid no valuable consider-

ation for the Henderson bond, whereon to ground an equity. The first requisite for the enforcing of a contract is that there be a valuable consideration, either of benefit bestowed, or of disadvantage sustained, by the party in whose favor a contract is sought to be enforced. Adams' Eq. 78; *Minturn* v. *Seymour*, 4 John's. Ch. Rep. 497. What benefit was bestowed on Shepard, by the contract transferring the Henderson bond to Cannaday?—or what disadvantage was sustained by the latter? We cannot see any.

But again, the contract sought to be enforced must not be oppressive on the defendant. Adams' Eq. 83. Where a contract is hard and destitute of all equity, the Court will leave the parties to their remedy at law. *King* v. *Hamilton*, 4 Peters' Rep. 311; *Leigh* v. *Crump*, 1 Ire. Eq. 299.

The specific performance of a contract in equity, is not a matter of absolute right in the party, but of sound discretion in the Court. To be carried into execution by a Court of Equity, the agreement must be "certain, fair and just in all its parts." Per GASTON, J., in *Leigh* v. *Crump*, *ubi supra*. The contract here was not fair. The defendant was made to believe that the agreement, as to the purchase of the land, was binding on him. The whole course of the plaintiff in rescinding the contract, as appears from the bill itself, shows this to have been the fact. It is not just that the plaintiff should keep the land, and claim the amount of the Henderson bond, for four hundred dollars. The contract was hard and oppressive on the defendant. There is no equity in the claim of the plaintiffs. If there was, it is not superior to that of the defendants. Where equities are equal between the parties, the Court will not interfere; much less will they displace a superior, to make way for an inferior equity. Here, the defendant Shepard has not only a superior equity, but also the legal title.

The bill alleges that Green Cannaday and Averitt, each, paid a valuable consideration for the Henderson bond; there is no evidence to support the allegation; but if proved, it would not avail the plaintiffs, for they had full knowledge that the

legal title to the bond was in Shepard, and all they can claim is to stand in the shoes of Jesse H. Cannaday, for whose benefit, no doubt, the action at law was brought, and this bill filed.

PER CURIAM. Bill dismissed with costs.

JAMES C. NIXON AND OTHERS *against* ALEXANDER H. LINDSAY AND OTHERS.

The maxim *caveat emptor* does not apply in cases where the parties are placed in a confidential position between themselves; for in such cases, there is an implied warranty of soundness, as well as of title.

Where parties act upon a mutual mistake as to a fact, Equity will relieve for the purpose of carrying the intention into effect. Therefore:

Where tenants in common of slaves, appointed commissioners to make partition among them, which is done as they suppose, fairly and equally, but it turns out that a slave allotted to one of the shares was, at the time, laboring under a disorder of an incurable character, which rendered her worthless, though this was not known to any of the claimants, or to the commissioners, it was *held* that the owners of the other shares were bound to contribute *pro rata*, to the party receiving the defective lot.

CAUSE removed from the Court of Equity of Randolph County.

An estate in certain slaves had been limited by the will of James Collett to Mrs. Nancy King, for her life, and then to her children; in consequence whereof, upon the death of Mrs. King, which took place in 1851, her children became possessed of nine slaves as tenants in common. The children of Mrs. King who are living, are, Sarah, the wife of Joseph A. Sutherland, Elizabeth, the wife of William Jones, and Ann, the wife of Frederick Pegge, the last mentioned of whom has sold his wife's interest in these slaves to Alexander H. Lindsay. Besides these, there was another daughter, Zelpha Nixon, in whom a fourth of this interest vested, but who died in the lifetime of her mother, and who left the plaintiffs, James C.,

Jesse H., and Zelpha A. Nixon, her children and next of kin, who were infants, and to whom Dempsey Brown was appointed guardian. Being thus entitled, Wm. Jones, Joseph Sutherland, A. H. Lindsay, and Dempsey Brown as guardians for the plaintiffs, agreed in writing under seal, dated 7th Jan., 1852, that S. G. Coffin, John Dorset, and Grafton Gardner, as commissioners, should divide the said nine slaves among them as the parties were severally entitled. They valued the whole nine slaves at $4,600, each share being $1150. In this division there were allotted to the plaintiffs, as the children of Zilpha Nixon, two slaves, Gabriel, valued at $750, and Mary, at $400. This valuation and division were reduced to writing, signed by the commissioners, and registered in the register's office of Davidson County. The negro woman, Mary, was sick at the time of the division, but it was believed by the commissioners, and others interested, especially by the guardian of the plaintiffs, that the disease was but temporary, by no means affecting her value; but it turned out, that she was at that time laboring under a deep and fatal disease, called the African consumption, which occasioned her death in about two months afterwards, notwithstanding the best skill, procurable in that community, was employed to attend her.

There are allegations in the plaintiffs' bill, charging that the defendants, especially Jones and his wife, were aware of the extent of the woman's disorder, and that they concealed the fact from the plaintiffs' guardian, and from the commissioners; moreover, that they fraudulently and deceitfully represented her to be sound, well knowing to the contrary. All of which matter is pointedly disputed by the defendants. They aver in their answer, that the plaintiffs' guardian was as well acquainted with the slave Mary as they, and much better than some of them who lived at a considerable distance off. Proofs were taken on both sides as to these points; but as their Honors, in making their decision, threw out of view the questions of fraud and diligence, it is not deemed necessary, or proper, to notice further the pleadings and evidence concerning them.

The bill prays that the several legatees shall be decreed to

pay to plaintiffs a *pro rata* amount of the loss sustained by the death of Mary; also a proportionate amount for the expense of nursing and medical treatment while she was confined.

The defendants, Jones and Lindsay, answer chiefly to the points above suggested, which have now become immaterial. The facts of the slave's ill health, of the fatal character of the disease, and of its permanent existence at the time of the sale, are not directly denied in either of the answers.

There were replication and proofs. The only part of the proof deemed important is the testimony of Dr. S. G. Coffin, who stated, "that he was one of the commissioners to divide the property; that as the parties had put their own valuation on the slaves, he did not examine into the state of Mary's health at that time; he had heard before of her sickness, and on the day of this partition, he heard Mrs. Jones say she had been unwell for some short time, but attributed it to exposure in sitting up with her mistress who had lately died; she then looked dull and stupid; in a short time afterwards, he was called upon to visit her, and found her afflicted with the scrofulous, sometimes called the African, consumption;" he says he attended her up to the time of her death, and is satisfied that "the first time he saw her, on the day of the division, she was laboring under the disease which terminated in her death in about two months, though he did not then suspect it."

The cause was set down for hearing upon the bill, answers and proofs, and was sent to this Court for trial.

Gilmer and Miller, for the plaintiffs.
Morehead, for the defendants.

Pearson, J. The bill contains an allegation that the defendants knew of the unsoundness of the slave, and fraudulently concealed it from the persons selected to make the division, and from the guardian of the plaintiffs; and, by misrepresentation and falsehood, caused them to believe that she was laboring under temporary indisposition, from want of sleep, &c., in attending at a sick bed.

Without passing upon the proofs, we put this allegation out of the case; nor do we lay any stress upon the fact that the plaintiffs were infants, and according to Lord Coke, are not bound by the partition, unless it be equal. Coke Lit. 171 a.

The question is this: tenants in common of slaves, select commissioners who make partition; in the lot assigned to the plaintiffs is a girl, who, at the time of the division, was unsound, having an incurable disease, called African consumption, of which she died about two months thereafter; the tenants in common, and the commissioners, had no knowledge of this unsoundness, and all supposed the girl's indisposition to be slight and temporary, and she was valued at $400; have the plaintiffs an equity for contribution?

The plaintiffs are entitled to contribution, upon the broad ground of substantial justice, expressed in the books by the maxim "equality is equity." This conclusion may be supported upon two well-settled principles.

1. In partition of chattels, which is an equitable proceeding, a warranty is implied, not only of title, but of soundness; and the common law maxim "*caveat emptor*" has no application, being restricted (as the word "*emptor*" imports) to *sales* of chattels. In the conveyance of a fee simple estate in land, no warranty is implied; because there is no tenure. In partition of land, a warranty is implied; because of the *privity of estate*. In sales of chattels a warranty of title is implied; but there is no implied warranty of soundness, the maxim of the common law being "*caveat emptor;*" because it was thought some "play" (as mechanics call it) ought to be allowed, for the chaffering and exercise of individual judgment, attendant upon the traffic in such articles when the parties are at "arm's length," and each is supposed to trade with his eyes open; so that in the absence of an express warranty of soundness, the purchaser of a chattel has no remedy except on the ground of deceit. This maxim, however, was peculiar to the common law. The civil law enforced a more refined morality, and acted on the rule, in the sale of chattels, "a sound price implies sound property." The common law max-

im was confined to sales, where, as we have seen, the parties are supposed to be at arm's length, and no authority or intimation in the books can be found, that it ever was supposed to extend to cases of partition. 1 Story's Eq. 221; 2 Kent 479; 2 Blackstone's Com. 451. Upon partition, the parties are in *equali jure*; there is supposed to be mutual confidence by reason of the privity of estate; and the object is to make an *equal division of a common fund.* There is no chaffering or trafficking about it; third persons, selected by themselves, or appointed by the Court, make the division, and if the common fund is not as large as the parties suppose, either from defect of title, or of unsoundness as to part, the loss should be borne equally; in other words, in partition there is an implied warranty both as to title and soundness.

2. Where parties act upon a mutual mistake as to a fact, Equity will relieve, for the purpose of carrying the intention into effect. Here, the intention was to make a fair and equal division. In consequence of a mutual mistake as to a fact, i. e. the unsoundness of one of the slaves, the division is grossly unequal; so that the share allotted to the plaintiffs, is of less value than the other shares, by more than one-third. Need any authority be cited to show that a Court of Equity will compel contribution in order to set the matter right, so that the loss may be divided? By way of familiar illustration: four boys have four apples; they divide; one of the apples, although sound outside, is rotten at the core and not fit to be eaten; will the others hesitate to make their comrade, who was so unfortunate as to get the rotten apple, equal, by each giving him a part of their's?

The plaintiffs are entitled to contribution for the estimated value of the slave, and also for the necessary and reasonable expense incidental to her last illness, and for loss of service; in regard to which there must be an account.

Per Curiam. Decree accordingly.

EMELINE ALLEN *against* JAMES ALLEN AND OTHERS.

Where land descended from A to his daughter B, and from her to her uncle C, who took an estate in reversion after a life-estate in the mother of B, it was *Held* that a deed made by C conveying "*all my interest in my brother A's property*," did not pass this interest derived from his niece B.

In a suit for partition by a sale, by one tenant in common against the co-tenants, where the petitioner is in possession of the land, and the interest sought to be sold, is a reversion, although the tenancy in common is denied by the defendants, inasmuch as an ejectment cannot be brought by the plaintiff to determine this right at Law, a Court of Equity will proceed to determine the matter; especially where the question of tenancy depends merely upon construction.

THIS was a PETITION for PARTITION, removed from the Court of Equity of Beaufort County.

Henry Allen died about 20th of September, 1849, seized of the premises described in the plaintiff's petition. He left, surviving him, his widow, the plaintiff, and an only child, a daughter named Isabel, his sole heir-at-law, to whom the land in question descended, subject to plaintiff's right of dower. In about a month after the death of her father, Isabel died without issue, being an infant, never having married, and without brother or sister.

It is insisted by the plaintiff that she became entitled to a life-estate in this property, and that the reversion, after her death was in Meazer Allen, William Allen, James Allen, Mary Anne Allen, and Frances Allen, (since intermarried with Edmund Harris,) as tenants in common, who were the next of kin, and heirs-at-law of their niece Isabel.

By virtue of an execution issuing from the office of the County Court of Washington, tested of November term, 1851, directed to the sheriff of Beaufort, the interest of William Allen was levied on, and duly sold at public auction, when the plaintiff became the purchaser, and having paid the amount bid by her, took a sheriff's deed for the same, by which, she alleges in her petition, she became seized in fee of the reversion, as tenant in common with Meazer Allen, James Allen,

Mary Anne Allen, and Frances Allen, now Frances Harris. The plaintiff alleges that a division of the property cannot be made without injury to the interests of all, and therefore she prays the Court to decree a sale and a division of the fund, according to the rights of the parties as above set forth.

The answer of the defendants was filed, denying that Isabel out-lived her father, Henry Allen, and contending, therefore, that the plaintiff, her mother, was not seized of a life-estate in the premises as claimed in her petition; but after proofs were taken, a written agreement was filed in the cause, signed by the counsel on both sides, admitting that Isabel did survive her father.

The answer of the defendants further denies, that the plaintiff is seized as tenant in common with them of the land in question; for that before the rendition of the judgment against William Allen, and prior to the test of the execution, (November term, 1851,) by deed bearing date 2nd day of February, 1851, the said William Allen sold and conveyed the land in question, to one Mary Allen, (his mother,) which deed is as follows:

"State of North Carolina, Washington County.

"This bargain was made and entered into this 2nd day of February, 1851, between William Allen of the one part, and Mary Allen of the other part. I, William Allen, Jun'r, do sell unto Mary Allen, all my right and interest in my father's estate at my mother's death, which I was to heir; also I sell unto Mary Allen, my interest in my brother Henry's property, for and in consideration of the sum of four hundred dollars, to me in hand paid by Mary Allen, which I do sell all my rights and titles unto Mary Allen, her heirs and assigns, administrators, executors, for ever, do warrant and defend unto Mary Allen and her heirs, from all claims and all persons whatsoever. To witness whereof I have hereunto set my hand and seal, the day and date first above written."

Signed. William Allen, [*seal.*]

There was replication and proofs; and the cause being set down for hearing, was sent to this Court by consent.

Rodman, for plaintiff.
Donnell, for defendant.

Pearson, J. There is plenary proof of the fact, that the child Isabel survived her father, Henry Allen; indeed, the counsel for the defendants admit this fact. It disposes of the case. The land descended to Isabel, subject to her mother's right of dower; by her death, the mother became entitled to a life-estate in the whole of the premises, and had no occasion to fall back upon her right to dower. The remaining question depends upon the construction of the deed of William Allen to Mary Allen, 2nd February, 1851, by which he conveys to her "my interest in my brother Henry's property." As the land descended from Henry to his daughter Isabel, although upon her death, her uncle, William Allen, became entitled to an undivided part thereof, as one of *her heirs-at-law*, this cannot, by any mode of construction, be included under the words "my interest in my brother Henry's property." The interest which he takes as heir of his niece, is an undivided part, subject to a life-estate of his brother's widow in *the whole;* whereas, the interest that he would have taken as heir of his brother, had he survived his daughter, would have been an undivided part, subject to a life-estate of his brother's widow in *one-third* thereof. So, the subject matter is essentially different, and the words of the deed do not embrace it; consequently, the plaintiff, by her purchase at sheriff's sale of the estate of William Allen, as one of the heirs of his niece Isabel, became entitled to the share of the said William in the reversion, subject to her life-estate, and thereby became a tenant in common with the defendants, in the reversion.

This question was suggested: as the defendants deny the tenancy in common, should not the plaintiff, according to the course of the Court, establish her title as a tenant in common, by an action of ejectment, before she can ask for partition? Such is the rule in ordinary cases. *Garrett* v. *White*, 3 Ire. Eq. 131. But in this case, as the plaintiff is in possession, and is entitled to a life-estate, and the tenancy in common is in re-

spect to the reversion only, an action of ejectment cannot be brought for the purpose of establishing her title as tenant in common of the reversion. In analogy to the rule in regard to chattels, where one tenant in common cannot maintain an action against his co-tenants, unless the property be destroyed, as settled in *Weeks* v. *Weeks*, 5 Ire. Eq. 111, we think the plaintiff is entitled to the decree prayed for. Besides the fact that the plaintiff cannot bring an action at law, there is the further consideration in this case, that the whole depends upon a mere matter of construction, which we are as well able to decide in this Court, as if the matter were brought before us sitting as a Court of law. The only material fact upon which the whole case turns is admitted, the denial of a tenancy in common being predicated in the answers upon a denial of a fact which is now admitted, to wit, the fact that the child outlived her father.

PER CURIAM. Decree for plaintiff.

RICHARD PILKINGTON *against* STEPHEN W. COTTEN.

In a reference to a Clerk and Master in Equity, to ascertain the value or profits of property, the general rule is, that he should report his own judgment according to his belief of the testimony, and not a conclusion arrived at by averaging the sums estimated by the witnesses.

The mode of ascertaining value by averaging the sums proved by the witnesses, is an exception to the general rule, only to be resorted to from necessity.

The opinion of a Clerk and Master, that a slave is worth $1200, is strongly corroborated by the fact that he hired for $150 per year, and will be sustained against the opinions of many who estimated his value at lower sums.

Where it appears that the Master fixes a charge for hires and profits at a given sum, on the ground that interest is not to be allowed, it is no ground of exception that he does not afterwards allow interest on them.

CAUSE removed from the Court of Equity of Chatham County.

The bill was filed for the redemption of certain property, real and personal, and at the last term of this Court it was

declared to be the opinion of the Court, that the plaintiff was entitled to redeem a certain negro slave, named Nathan, upon the payment of the sum paid by defendant, with interest; accordingly an interlocutory decree was made, referring to the Clerk and Master in Equity of Chatham, to enquire and report as to the present value of the slave in question, and his hire for the time he has been in the defendant's possession, and the amount of the debt for which the slave was security, with interest thereon.

Besides the slaves sought to be redeemed, a tract of land lying on Terrill's creek, was also conveyed in trust to secure the debt due by the plaintiff to the defendant, as an additional security; and it appears that for several years a part of this land, to wit, about thirty acres was in the possession and cultivation of the defendant. The whole claim of the defendant against the plaintiff has been satisfied by the sale of the other property held in trust for its payment, and therefore, the plaintiff insists that the defendant should account with him for the issues and profits of this land. The defendant avers in his answer, that the land used and cultivated by him was no part of the land owned by the plaintiff, but belonged to one Samuel Pilkington, and thereupon, at the last term of the Court, it was ordered that it be referred to the Clerk and Master of Chatham, aforesaid, "to enquire and ascertain whether the defendant Cotten is, or has been, in possession of any part of the plaintiff's land, and if so, how much, for what length of time, and the annual nett rent therefor," and that he report thereon to the present term of this Court.

In obedience to these several references, Mr. Waddell, the Master, reported that Nathan is worth $1200; that he has been worth during the last six years $640, making $1840; that the debt for which he was pledged is, with interest, $332,10, leaving a balance due plaintiff $1507,90.

He also reports, that the land occupied by the defendant, does belong to the plaintiff; that the cultivation was continued for ten or twelve years, and that it was worth from forty to fifty dollars per annum. In conclusion, he charges the de-

fendant with a total of $480 for land rent, which being added to the other balance of $1507,90, makes a total against defendant of $1987,90.

The evidence taken on these enquiries, accompanies the report.

The defendant excepts to the report, because the Clerk and Master takes the highest price put upon Nathan by a single witness, whereas there were several, who placed his value lower, and some much lower, and that from these statements, the amount allowed ought to have been averaged at $900.

The defendant excepts also to the report, on the subject of the occupation and rent of the land; that the conclusion of the referee is against the weight of the evidence.

The plaintiff excepts, because the referee does not allow interest on the hire and rent found by him.

The cause was again heard upon these exceptions.

Manly and *E. G. Haywood*, for plaintiff.
Haughton and *Winston, Sr.*, for defendant.

Pearson, J. The defendant's exceptions in respect to the Master's estimate of the value and hire of the slave Nathan, are overruled. The exceptions are based on the ground that the Master ought to have adopted an average of the estimate made by the witnesses on both sides. This position is not tenable. The general rule is, that the Master should form an independent opinion of his own, according to the weight of the testimony, and if one of the witnesses, from his intelligence and means of information in regard to the matter of enquiry, is, in the opinion of the Master, more to be relied on than a half dozen of the other witnesses, it is proper that the Master's opinion should adopt the estimate of this one most reliable witness. If this rule in respect to "the *average* of the *estimate* of witnesses," should obtain, the decision of questions of this kind would not depend upon the sound judgment of the Master, but upon the number of witnesses that it may be in the power of each party to produce. *Morrison* v. *Mc-*

Leod, 2 Ire. Eq. 108; *Walling* v. *Burroughs*, 1 Jones' Eq. 21. This mode of arriving at a conclusion by an "average of estimates" is put as an exception to the general rule above stated, and is tolerated only from necessity in certain cases.

We concur with the Master, that if a negro boy, eighteen years of age, has such qualities and recommendations as will command a hire of $150 per annum, the value of the boy cannot be less than $1200; the opinion of a dozen witnesses to the contrary notwithstanding.

It may be proper also to say, that the inclination of the Court is to concur with the Master in matters depending upon mere estimates of value, and his opinion is taken *prima facie* to be correct, unless error be shown.

The plaintiff's exception in regard to the interest upon the annual hires is overruled. The Master evidently fixes the amount of hires, upon the ground that annual interest is not to be allowed, and we see no reason to disturb the result at which he has arrived.

In respect to the land mentioned in the pleadings, the cause is retained, with *liberty* to the plaintiff to bring an action of ejectment, in which he is to be the lessor, and the defendant is to admit that Steadman and Bynum have re-conveyed to Richard Pilkington, or to the plaintiff as his heir; and that he (the defendant) is in possession, so as to put the question *solely upon the title of Richard Pilkington.*

PER CURIAM. Decree accordingly.

THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA *against* JOSIAH MAULTSBY.

A plea of former judgment, in order to amount to a bar, must be for the same subject matter, as well as between the same parties.

Therefore, where a party brought a suit, supposing he had the title, which suit was decided against him, this is no bar to another suit brought by him after acquiring a title.

CAUSE transferred from the Court of Equity of Columbus County.

The plaintiffs, in their bill, allege that Rachel Rouse died in the county of Columbus, in the year 1841, intestate, possessed of a large personal estate, consisting of slaves, &c.; that at August term, 1841, of the County Court of that county, letters of administration were granted on her estate to the defendant, who qualified and took upon himself the burden of administering the said estate; that defendant, as administrator, has kept and retained possession of the assets ever since the year 1841, and still keeps and retains the same.

The plaintiffs allege further, that by law they are entitled to the above named property, and they pray that the defendant may be decreed to account with them for the above mentioned personal property, and deliver to them the slaves, with their increase and hires, and pay over to the plaintiffs all such sums of money as may be in his hands belonging to this estate.

To this bill the defendant pleaded in bar, that at the Spring Term, 1851, of the Court of Equity of the same county, the plaintiffs exhibited their bill of complaint against this defendant, therein praying, among other things, that the defendant might be decreed to account with the plaintiffs, for the personal estate of the said Rachel Rouse, and pay the same over to them, and that they demurred to the bill of the plaintiffs; and that this demurrer was sustained in the said Court of Equity of Columbus County, at its Fall Term, 1851, whereby it was adjudged, decided and decreed, that the plaintiffs were not entitled in Equity to the account and relief which by their bill was sought against this defendant; and for further plea, he said, that the plaintiffs (being the same persons now suing) prayed and obtained an appeal from the judgment, decision, and decree of the said Court of Equity to the Supreme Court of this State; and that the said cause coming on to be heard in that Court, at the December Term, 1853, their Honors affirmed the decision of the Court below. The defendant avers in his plea that the bill now exhibited against this defendant,

is for the same matter as is contained in the bill before exhibited by these plaintiffs, against this defendant.

To this plea the plaintiffs filed a replication, in which they admit that the Supreme Court, at the term of said Court mentioned in the defendant's plea, did adjudge and decree that the property and effects then sought to be recovered of the defendant, did not, at that time, in any wise belong to the plaintiffs, but that the Literary Board of the State then had a right and title to the same.

But they further say in reply to the defendant's plea, that they ought not to be concluded and estopped by the judgment and decree above pleaded; for, that since the determination of that suit and controversy, by virtue of an Act of the General Assembly of the State, they have acquired the right to demand, sue for, and recover, all sums of money and other estate, of whatever kind, which shall remain in the hands of any administrator or executor, for seven years after his qualification, unrecovered or unclaimed by suit by creditors, next of kin, or others entitled thereto, and thus have acquired a title to sue for the property in question.

The cause was set down for hearing upon the bill, plea, and replication, and removed to this Court by the consent of the parties.

Bryan, for plaintiffs.
Troy, for defendant.

Pearson, J. The plaintiffs file a special replication by way of confession and avoidance. The *new matter*, is the fact that, since the decree in the former case, the Legislature has conferred upon the plaintiffs the right to all such property as that in question.

That the Legislature has power to transfer funds from one "agency" to another, is settled by the opinion in the former case. So, the new matter alleged in the replication, avoids the plea; for, in point of fact, this is not an attempt to try over again a matter that has been tried, but is the allegation

of a title subsequently acquired. The former decree fixes the fact, that when the plaintiffs filed their first bill, they had no title; but, *non constat* that they had no title when the second bill was filed. Although the former decree was between the same parties in regard to the same subject matter, yet, the title now relied on is a different one, subsequently acquired; so, a decree, by which the Court declares its opinion to be that the plaintiffs *now* have title, is not inconsistent with, or repugnant to, the former decree, in which the Court declares its opinion to be, that the plaintiffs did not *then* have title.

Upon examination, it appears, that the plaintiffs did not have title when the bill was filed, because of the fact that the Act of Assembly under which they claim title, had not then gone into operation. This is a fatal objection, and the bill would consequently have been dismissed, but *without prejudice*, so as to allow the plaintiffs, upon payment of costs, to file a third bill. This objection, however, is removed by consent on the part of the defendant's counsel, who very properly concedes, that the only object was to get an opinion of the Court in regard to the effect of the late Statute conferring title on the plaintiffs, and waives the objection, upon condition that the plaintiffs pay the costs of this suit; which is agreed to.

There will be a decree declaring the opinion of the Court to be, that the plaintiffs are entitled to the fund in the hands of the defendant, and the plaintiffs must pay the costs.

PER CURIAM. Decree accordingly.

PETER ADAMS, ADM'R. WITH THE WILL ANNEXED, *against* FRANCES GILLESPIE AND OTHERS.

Where one bequeathed personal property to his wife for life, and then to his daughter for her life, and then to her (the daughter's) surviving children, it was *Held* that the wife's dissent from the will removed the interposed life-estate, and that the daughter took the property immediately.

Where one-half of the value of a female slave and one-half of her increase were given to the wife, and the other half to a grand-son, but the hire of all the slaves, including this, had, in a previous part of the will, been given to the wife for life, and then to her daughter for life, it was *Held* that the slave should be sold, and that half the value of the slave should go to the widow, and the interest on the other half of the value be paid to the daughter during her life, and after her death, the principal be paid to the grandson.

Where a horse, saddle and bridle were bequeathed to an infant, under five years of age, there being no such chattels on hand, the executor was directed not to buy the articles; but it was *Held* that, in the distribution of the estate, the child's share should be augmented by the value of these articles thus pretermitted.

Cause removed to this Court from the Court of Equity of Guilford County.

C. A. Gillespie died in the year 1854, leaving a will which was duly proved; and there being no executor named therein, the plaintiff was appointed Administrator with the will annexed, by the County Court of Guilford. The administrator seeks the advice of the Court as to the proper construction of the will, which is as follows:

"Item 1. I give and devise unto my beloved wife, Frances Gillespie, the house and lot whereon I live, all my household and kitchen furniture, and all necessary firewood off of my land, and also the proceeds of the annual hire of my negroes; which said property my said wife is to have during her life, and after her death, to go to the children which my daughter Louisa Whittington may leave at her death, she, to wit, my said daughter, having the benefit of said property, to her sole and separate use, during her life, after the death of my said wife.

"Item 2. I give absolutely to my said wife, one half the value, and one half the increase of a negro girl, Jane; the other half the value, and half the increase, I give to my grandson, Monroe Whittington, and his heirs forever; also to my said wife, one horse and one cow, her choice of each, my car-

riage and the interest of all my money on hand, or at interest at my death.

"Item 3. I give and bequeath to my grandson, Monroe Whittington, my gold watch, a good horse, saddle and bridle; and to my grandson, Henry Whittington, my silver watch, also a good horse, saddle and bridle. I also give to my grandson, Monroe, a negro girl, Doucy Anne, and her issue, to him, his heirs and assigns forever; but if he should die under age, and leave no issue, then the girl, Doucy Anne, and her issue, are to be equally divided between his brothers and sisters.

"Item 4. All the residue of my property not herein disposed of, whether of my own acquisition, or belonging to me by descent, devise, or otherwise, I desire may be equally divided between the children of my daughter, Louisa J. Whittington, that may survive her.

"Item 5. I also give, devise and bequeath to my grandson, not yet named, he being the third child of my daughter, Louisa J. Whittington, a good horse, saddle and bridle."

The widow of the testator dissented from the will, and claims her dower in the land, and a third of the personal property, besides a year's allowance in the crop, stock and provisions. Louisa J. Whittington is the only child and heir-at-law of the testator, and having intermarried with Alphonzo Whittington, has three children, to wit: Monroe, Henry, and Charles, besides being *enceinte* with another.

The plaintiff states in his bill, that he has sold all the personal property, except the slaves and the watches; and being in doubt as to the construction of the will, asks the instruction and direction of the Court in the following particulars:

As the widow has dissented from the will, what becomes of that which was left to her for life? Does it go to Mrs. Whittington immediately, or is her enjoyment of it to be still postponed to the death of the widow Frances?

If Mrs. Whittington takes it now, is it to be paid and delivered to her husband and herself, or to some other person for her?

Inasmuch as all the slaves would seem to be included

in the first clause, giving the widow their hires for her life, and then to Louisa for her life, when is Monroe, who is an infant, five years old, to come to the possession and enjoyment of his legacy of half the value of the slaves, Jane and Doucy Ann, and their issue? Would he be safe in delivering the slave, Doucy Ann, to Alphonzo Whittington, as the guardian of his son, Monroe? What is to be done with the girl, Jane, the widow having dissented? Can she be sold, and the money distributed?—if so, upon what terms?—or is she still to be hired out, in order that Louisa may get her share of the hire for her life?

What is he to do with the watches? and what is his duty in relation to the horse, saddle and bridle bequeathed to each of these infants? Is he to buy such articles, if they be not on hand?—and if so, at what time?—and if to be bought, from what source is he to raise the funds?

What is the Administrator's duty in regard to the residuum under the 4th clause of the will? Does Mrs. Whittington take an estate by implication under the will? or is it hers by descent during her life?

The widow, Mrs. Frances Gillespie, Alphonzo Whittington, and his wife Louisa J. Whittington, and their children, by their guardian, all join in an answer, admitting the facts as set out in the plaintiff's bill, and agree to submit to the advice and direction of the Court in the premises.

The cause was set down for hearing on the bill, answer and exhibit, and removed to this Court by consent.

Miller and *Gilmer*, for plaintiff.
No counsel for the defendants in the Court.

Battle, J. The will which is now submitted to us for construction, does not disclose much inherent difficulty in the ascertainment of its meaning. The doubts which are suggested in relation to it, have been raised principally by the act of the testator's widow in dissenting from it. By that dissent she has become entitled to her dower of one-third of all the testa-

tor's real estate for her life, and to an absolute interest in one-third of all his personal property which may remain after the payment of all the debts and the charges of administration; but her share "shall be allotted to her in such manner as to create as little derangement of the provisions of the will, as practicable." (Rev. Stat. ch. 121, sec. 12; Rev. Code ch. 118, sec. 12).

Having premised these remarks, we proceed to state the construction which, in our opinion, must now be placed upon the will. The dissent of the widow has removed her life-estate from all the property given to her by the will, and which she does not take independently of it, and the effect of it is to hasten the enjoyment of the life-estate devised and bequeathed to the testator's daughter. The estate thus given to the daughter, embraces all the slaves which may not be allotted to the widow; for though the girl Doucy Ann, and one-half of the girl Jane, are given to the testator's grandson, Monroe Whittington, in terms which might otherwise import a present bequest, yet, to make it consistent with the first clause of the will, the bequest must be subject to the life-estate of the legatee's mother. It is unnecessary to decide whether Mrs. Whittington takes the real estate for her life by implication from the will, or by descent, as being undisposed of by the devise. It is certain that she takes it the one way or the other; because the interest of her children in it is expressly postponed until her death. The gold and silver watches are specific legacies, and must be delivered to the guardian of the legatees, to be kept for them. The testator, not having such articles on hand to make the legacies specific, could not have intended horses, bridles and saddles to be bought immediately for children from one to five years old; but the legatees to whom they are given, will be entitled to their value at the death of their mother, which will make their shares of the residue greater, by the value of such horses, &c., than those of the other children, in the division at the death of their mother. The share of Monroe Whittington, in that division, will be further increased by the girl, Doucy Ann, and her increase, and by half the value of the girl Jane.

In allotting the widow's share, she must have, as a part of it, half the value of the girl, Jane, and for the purposes of a division, the girl must be sold; and after the widow gets half the proceeds, the interest on the other half must be paid to the daughter for life, and then the principal will belong to Monroe.

As the property given to the daughter for her life, is expressed to be for her sole and separate use, she must have a trustee appointed to hold it for her, to whom it will be the duty of the administrator to deliver it. The daughter's estate for life, in the real estate, whether acquired by descent or divise, is sufficiently secured to her by the Act of 1848, ch. 41. (Rev. Code ch. 56, sec. 1).

The necessary accounts must be taken, and the cause will be retained for further directions upon the coming in of the report.

Per Curiam. Decree accordingly.

JESSE P. PARKER AND ANOTHER, EX'RS., *against* JOHN B. LEATHERS.

Where one of the legatees of an estate, being also an executor, by the consent of those interested, buys property at the executors' sale, not for the purpose of a division, but simply for his own gain and emolument, he must abide by the rule of *caveat emptor*; and unless he avers and proves a warranty, or a fraud practiced upon him, must bear the loss arising from unsoundness.

Cause removed from the Court of Equity of Orange County.

Joseph Armstrong died in the year 1840, having bequeathed to his widow, Peggy Armstrong, during her life or widowhood, four negro slaves, to wit, Daniel, Jacob, Tamor and Abram, with a proviso, that if she remained his widow, she might dispose of said slaves by will among her four children, James Armstrong, Nancy Coggin, wife of George T. Coggin,

Mary Anne Parker, wife of Jesse P. Parker and Parthenia Leathers, wife of John B. Leathers, who were also his children, being the only children of the marriage between them, and the next of kin of both the husband and wife. The plaintiffs, Jesse P. Parker and George T. Coggin, and the defendant, John B. Leathers, were appointed executors of the will of James Armstrong, and having had the same admitted to probate, they qualified and undertook the duties of executing and performing the trusts of the same. They promptly and satisfactorily administered all the trusts therein confided, as to the first property that came to their hands, which was the bulk of the estate, by paying the debts and legacies, &c.

Afterwards, in 184–, Mrs. Peggy Armstrong, the widow of the testator James, died intestate, without having married, and without having exercised the power given her by her husband's will of giving the four negroes among her children, either by deed or will, and they, the executors of James Armstrong, took the negroes and other property left by Mrs. Armstrong, and, by agreement among themselves, sold the same at public auction, for the purpose of distributing the value amongst the four children. John B. Leathers, one of the executors, and one of the legatees, being anxious to own the negro slave Jacob, by the consent of Parker and Coggin, the other two executors, and of James Armstrong, the only other person interested in the property, was permitted to bid at this sale for the slave Jacob, and it was agreed that if he made the highest bid, the slave should be his. He made the highest bid at $725, and accordingly took possession of Jacob, and kept him until the death of the slave, which occurred in ——; and, as the plaintiffs say, paid $168 of the purchase money. The prayer of the bill is, that the said John B. Leathers account for what has come into his hands as an executor of Joseph Armstrong; and that he account for the price of the slave Jacob, thus purchased by him with the consent of the plaintiffs; and that he pay and satisfy to the plaintiffs, in such proportions as they may be severally entitled, their shares of the estate of Joseph Armstrong.

The answer of the defendant denies that he paid anything for the said slave after purchasing him, as set out in the plaintiffs' bill; but says that he told Parker, who was the receiver of the funds for which this last property sold, that he might appropriate an amount coming to him from that source towards liquidating this debt, as far as that amount would reach, and that it was about the sum stated in the bill.

He says further, that he has refused to account and settle with his co-executors, and the other plaintiff, James, who, with himself, are all the legatees of Joseph Armstrong, because they insist upon his paying for the slave Jacob, so bid off by him, the full price of $725; whereas, he says, at the time of this sale, this slave was laboring under an incurable disease, of which he was not aware at the time of the sale, and which, notwithstanding the greatest care and attention, very soon terminated his life.

The plaintiffs, by way of anticipation in their bill, say that it is true that the slave Jacob, died in about 16 months after the purchase by defendant; but whether he died of any disease existing at the time of the sale, they do not know; and if it be material, they insist on holding him to strict proof of that fact. But they furthermore say in their bill, in anticipation of this defense, that even if it be true, that the slave was thus afflicted at the time of the sale, the plaintiffs had no knowledge of the fact, and that the defendant had better means of knowing it than they. Replication, and proofs taken.

The cause was set for hearing upon the bill, answer and proofs, and sent to this Court.

Norwood and *Bailey*, for plaintiffs.
Bryan, for defendant.

Nash, C. J. This case is essentially different from *Nixon* v. *Lindsay*, *ante* 230, decided at this term. That was a bill to equalise a partition made by distributees. The negroes were divided into lots, intended to be equal. In that assigned to the plaintiff, was one known to be sick, but her sick-

ness was not considered to be dangerous. In a short time she died from an incurable disease, which she had at the time of the partition, though unknown to the parties; and the plaintiff prayed for contribution from the other distributees, which was granted by the Court. The case now before us is to call the defendant to an account, as one of the executors of Joseph Armstrong. The plaintiffs, together with the defendant, Leathers, were co-executors. By his will, the testator made a large bequest of slaves to his widow, during her life. Among them was one by the name of Jacob, who, together with the other property bequeathed to the widow, was, after her death, sold by the executors as part of the estate. The defendant, Leathers, with the consent of all interested, purchased the negro, Jacob, at the price of $725, took him into possession, and made sundry payments amounting in the whole to $168. In about sixteen months Jacob died, and the defendant refused to pay anything more, upon the allegation, that at the time of the sale and purchase, the negro was unsound with a mortal disease which subsequently put an end to his life. No fraud is alleged. This defense presents the case of a purchaser refusing to pay for a slave he has purchased, without any allegation of fraud, or taking any warranty, but merely on the ground that he was unsound at the time of the sale, and that unknown to the vendor. Equity takes care of those who take care of themselves. In a parol sale of personal property there is no implied warranty of soundness, and the defendant ought to have taken a written conveyance with a covenant of soundness. He has not done so, and must account for the price of Jacob, deducting the payment made by him.

Per Curiam. Decree accordingly.

HARRISON SMITH *against* JOHN A. TURRENTINE AND OTHERS.

Where a debtor makes a deed of a slave by the name of C to a creditor, in satisfaction of a previously existing debt, such creditor cannot, on the allegation that another slave J, was meant, and that the wrong name was inserted, either by the fraudulent misrepresentation of the debtor, or by mistake, have the aid of a Court of Equity, to set aside a subsequent deed of trust conveying the slave J, to secure *bona fide* debts, without notice of the fraud or mistake, in order that the first deed may be reformed so as to take in the slave J.

Equity never interferes to aid one creditor against another, on the ground of mistake. (*Knight* v. *Bunn*, 7 Ire. Eq. Rep. 77, cited and approved.)

CAUSE removed from the Court of Equity of Orange County.

On the 14th of October, 1854, Samuel D. Schoolfield conveyed by deed to the plaintiff, Harrison Smith, of the firm of W. W. & H. Smith of Philadelphia, in the State of Pennsylvania, a negro woman by the name of Charlotte, aged about 27 years, with general warranty, for the consideration of $800. The deed was proved on the 30th of December in that year, put in the Register's hands on the 1st of January, 1855, and registered on the 9th of the same month. At the time of the execution of this deed, or bill of sale, Samuel D. Schoolfield had no slave by the name of Charlotte, and had but one woman whose name was Jane. She had been purchased of Mrs. Hooker by said Schoolfield. Previously to the execution of this deed, Schoolfield had executed another deed for a woman "Charlotte" to the same party; but some difficulty arising about its registration, it was agreed that that should be destroyed and a new one substituted in its place, which was done, the attorney who drew the latter deed neither seeking nor obtaining any information as to the name or identity of the slave, other than was derivable from the former deed. The slave conveyed was not present, and was entirely unknown to the plaintiff or his agent who conducted the business; nor was she delivered to the plaintiff or his agent when this bill of sale was made; but as soon as the contract was executed, the vendor Schoolfield agreed to hire the woman at

five dollars per month, and for that reason retained her in his possession without her being at all produced to the plaintiff's agent. The plaintiff was an entire stranger in the country, and had never seen any slave belonging to Schoolfield, nor did his agent have any knowledge of the name or personal identity of any slave in his (Shoolfield's) possession. There was no money paid when this deed was executed. Schoolfield was indebted to the plaintiff and his co-partners in the sum of $2600, or thereabouts. When the first conveyance was made, he was credited by the plaintiff with eight hundred dollars on that debt, and when the second conveyance was made, on 14th of October, the credit as before entered, was simply permitted to stand.

It is alleged in the plaintiff's bill, that the true name of the only woman in the possession of Schoolfield was *Jane*, and that she was intended to be conveyed; that either from false information given by Schoolfield, intended to cheat and delude plaintiff's agent, or from a mistake in the agent who also acted as draftsman, and prepared the instrument, the name of Charlotte was inserted instead of Jane. Plaintiff further alleges, that being so in possession of the slave Jane, by virtue of the contract of hiring on the 8th of January, 1855, he conveyed her, with a considerable amount of other property, to the defendant John A. Turrentine, for the nominal sum of $5, in trust to secure certain debts therein named, and save harmless and indemnify, James C. Turrentine, John J. Freeland, Andrew C. Murdock, Edmund Strudwick and others, who were bound for him as sureties, and that the trustees and *cestuis que trust* above named, all, had notice of the fraud or mistake when the above conveyance was taken. The bill prays for an injunction to prevent the defendants from selling the slave Jane; for a re-conveyance of her to plaintiff; for an account of her hire, and for general relief.

The defendants (the trustee and *cestuis que trust*) in their answer, deny that they had knowledge of the plaintiff's conveyance of any slave whatever; they insist that even if the registration could have affected them with notice under any

circumstances, such could not be the effect in this instance, as the plaintiff's deed was not spread upon the register's book until the day after their deed was made; they deny that they had any knowledge of any fraud practiced on plaintiff by Schoolfield, or of any mistake on his part in taking a deed for the slave Charlotte instead of Jane, and they submit whether, if such had been the fact, they could, by parol evidence, have an alteration of the contract, so as to convey one slave instead of another; and they also submit whether the gross negligence of the plaintiff in purchasing and taking a conveyance of a slave which was not present, and which he never saw, and about which, or its value he made no enquiries, does not effectually preclude him from any relief, whatever his equity may be in other respects. They aver that their own conveyance was fair and *bona fide*, for the purpose of securing *bona fide* debts, and to indemnify against actual liabilities incurred by them for Schoolfield.

There were replication and proofs taken, and the cause being set down for hearing, was removed to this Court by consent.

Bryan, for plaintiff.
Graham and *Bailey*, for defendants.

Battle, J. We deem it unnecessary to consider some of the interesting questions which were ably discussed at the bar. There is a plain ground of equity, upon which, without adverting to any other, the plaintiff's bill must be dismissed. At the time when the slave Jane was conveyed to the defendant Turrentine, in trust for the other defendants who were creditors, it is certain that there was no bill of sale, or other instrument, by which she was conveyed to the plaintiff. Supposing then, that by mistake, or by the fraud of Schoolfield, the debtor, the name of Charlotte was inserted in the bill of sale to the plaintiff, the defendants cannot be affected by it. It is not pretended that they were parties to any fraud, and it does not appear that they had any notice of either fraud or mistake. The plaintiff himself was but a creditor, seeking to

save his debt by purchasing the slave, and therefore has no higher claim to the interference of the Court of Equity than the other creditors. The latter fairly and honestly obtained the legal estate, and have a right to retain it. "Equity never interferes to aid one creditor against another on the ground of mistake." *Knight* v. *Bunn*, 7 Ire. Eq. 77. And even if the debtor intended to defraud the plaintiff, equity will not relieve him at the expense of the defendants who are as innocent and meritorious as he.

PER CURIAM. The bill must be dismissed with costs.

GEORGE W. GLISSON *against* BUCKNER L. HILL AND OTHERS.

To convert a purchaser who takes a deed absolute on its face into a trustee for another, and to convert the conveyance into a mere security for money loaned or advanced, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage, and the intention must be established by facts dehors the deed of conveyance, which are inconsistent with an absolute conveyance.

CAUSE removed from the Court of Equity of Duplin County.

The plaintiff, in 1839, was seised in fee of a tract of land lying in the county of Duplin, containing about 460 acres. An execution was issued on a judgment against the plaintiff, and the land was sold by the sheriff to the defendant Buckner L. Hill, for the price of $200. Hill afterwards sold it to the defendant Smith for $300, and he to the defendant Herring for $500.

The plaintiff alleges that shortly before the sale of this property, he went to the defendant Hill and "desired him to bid off the land, pay off the entire sum claimed by the execution, and hold it until the plaintiff could redeem the same." As a further inducement, he proposed to the defendant Hill, that he, plaintiff, would secure to him, out of the land, a certain debt which a brother of plaintiff owed him (Hill) of

about $50. These terms, he says, were agreed to by the said Hill. He says that the land was worth $1000 or $1200, and that it was knocked off to Hill on the first bid, no one bidding against him, because it was understood that he was acting as the friend of the plaintiff. He further alleges, that Hill took a deed from the sheriff for the land, but that plaintiff, in pursuance of the contract to redeem, remained in possession of it for one year after the sale, when he, Hill, sold it, at plaintiff's request, to the defendant Geo. Smith, who agreed to take it, the more effectually to befriend plaintiff than was convenient for the defendant Hill to do, as he wanted his money. He says it was expressly agreed that Smith should hold the title to the land till plaintiff could find a purchaser, and he was then to take back his principal and interest and let it go to such purchaser; that in violation of his agreement, he (Smith) shortly thereafter sold the land to the defendant Herring; but neither Hill, nor Smith, in the deeds which they made, would warrant the title of the premises. He alleges that both Smith and Herring had knowledge of the trust under which Hill purchased and held the land for the plaintiff, and that Herring had knowledge of the trust on which the land was transferred to Smith. The prayer is for a re-conveyance and an account; also for general relief.

The defendants severally answered the bill, and each denied that he purchased the land in question upon any such trust as is set up by the plaintiff. The defendant Hill, in his answer, admits that the request was made by the plaintiff for him to buy the land and let plaintiff redeem, and as an inducement for him to do so, he did propose, that on redeeming the same, he would pay a certain debt of $50, which he, plaintiff, had undertaken before that time to pay for one Dennis Glisson, (plaintiff's brother) out of certain dues which he had to collect for his brother; but he denies that he acceded to any such propositions. He says his main object in making the purchase was to save the debt of $50; that after the sale, on being importuned by plaintiff, he told him if he could get a purchaser to take the land off his hands, he would re-convey

and let him have all that might be raised over the amount paid by him for the land, and the fifty dollars due on account of Dennis Glisson; and further to favor him, he agreed that he might remain on the land for an indefinite length of time. He did let him remain in possession for a year after the sale, but being pressed for the money by the plaintiff in the execution, (who had taken his note), and learning from the defendant Smith, that he was about to lose by the plaintiff, and was anxious to save himself out of the land, he let him have the land at $300. He says that Glisson was cognizant of this transfer, and consented to it under the hope, as he said, that Smith would give him a chance; but he is not aware of any contract or agreement of Smith to let plaintiff have the land back on any terms. Herring, in his answer sets forth, that these defendants were sued in the Court of Equity of Duplin County, by one Enoch Cobb, a creditor of the plaintiff, who charged in his bill that this land had been fraudulently obtained by defendant Hill, to hinder and delay the creditors of Glisson, and to hold it so that he might have the benefit of it; also, that the defendants Smith and himself, (Herring,) were parties defendant in the same; who were charged to have purchased with notice. The plaintiff in this suit was also a party defendant in that, and in his answer *admitted* and *confessed* that he had made the fraudulent conveyance as charged. He also stated, that after keeping the land in question for about twelve months, claiming and using it as his own, he surrendered the possession to Cobb, whose tenant kept it until he was turned out by some legal proceeding instituted by the defendant Herring. The cause was taken to the Supreme Court, and there it was decided that the plaintiff Cobb had not sustained his bill with proof, and it was accordingly dismissed. The full record of that suit is filed as an exhibit. On this showing, it is submitted by defendant Herring, whether a plaintiff, who thus stands convicted of fraud upon his own admission, can be heard to set up the same conveyance as a trust?

There was replication to the answer and proofs; exhibits

were also filed; and the cause being set down for hearing, was sent to this Court for trial.

Reid, for plaintiff.
W. A. Wright, *W. B. Wright* and *Husted*, for defendants.

Battle, J. We have had occasion to say in several cases recently, that in order to correct a deed which is absolute on on its face, and to convert it into security for a debt, it must be alleged, and proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; and the intention must be established, by proof not merely of declarations, but of facts *dehors* the deed, inconsistent with the idea of an absolute purchase. *Sowell* v. *Barrett*, Busb. Eq. Rep. 50; *Brown* v. *Carson*, Ibid 272; *Clement* v. *Clement*, 1 Jones' Eq. Rep. 184; *Briggs* v. *Morris*, Ibid 193; *Lamb* v. *Pigford*, Ibid 195; *Taylor* v. *Taylor*, Ibid 246.

The only circumstances besides the declarations of the defendants, relied upon in this case, are, the fact that the plaintiff remained in possession for some time after the purchase, and the inadequacy of the price paid by the defendants. The latter cannot of itself avail much, (see *Brown* v. *Carson*, *ut supra*); but in connection with the possession retained by the plaintiff, it might have great effect, were not the testimony met by proof on the other side which entirely destroys its force. Among the exhibits filed in the cause, on the part of the defendants, is the transcript of the record of a suit in Equity, in which one Enoch Cobb was plaintiff, and the present complainant and defendants were defendants. In his bill, Cobb charged that the dealings between the present plaintiff and the defendant Hill, and subsequently between these two and the other defendants, were secret transactions entered into for the purpose of defrauding the creditors of the present plaintiff, of whom he, Cobb, was one. The present plaintiff, in his answer to that bill, admitted the truth of the charge, and stated that after keeping the land in question for about

twelve months, claiming and using it as his own, he surrendered the possession to Cobb, whose tenant kept it until he was turned out by some legal proceedings instituted by the defendant Herring. Such an admission is entirely inconsistent with, and disproves, the case sought to be established by the testimony in this cause. The omission to insert the clause of redemption, according to the present plaintiff's own acknowledgment made under oath, was not by reason of ignorance, mistake, fraud, or any undue advantage taken of him, but was by design to defraud his creditors. He himself repudiated the possession as held under the defendants Hill and Smith, by attorning to Cobb, and surrendering the possession to him.

The bill must be dismissed; but without costs, as the plaintiff was allowed to sue *in forma pauperis.*

PER CURIAM. Decree accordingly.

MARY B. FOULKES *against* JAMES F. FOULKES.

A legacy is given upon condition that a certain sum of money due the legatee, is not collected by him after the testator's death; the money is, however, collected before the testator's death; the executrix, notwithstanding this, assents to the legacy, and gives it over to the legatee; she cannot sustain a bill to have the property restored to her, upon the ground, that when she assented to the legacy, she was *ignorant* that she was herself entitled to a life-estate in that property,—no fraud or unfair means to obtain her assent being alleged.

CAUSE removed from the Court of Equity of Guilford County.

Dr. John A. Foulkes made his last will and testament several years before his death, which occurred in the year 1853, and appointed the plaintiff and another to act as executors, but the former only qualified.

By the fifth clause of his will, he gives to the plaintiff all his personal property, not specifically disposed of, during her

life, with the power of disposing of one-third part of his personal estate (slaves excepted) between his two children.

The seventh clause of his will is as follows: "I give, devise and bequeath to my son, James F. Foulkes, two slaves, Andrew and Milton, which are to go into his possession upon his arrival at full age. My reason for this gift I wish explained: I do not consider the two slaves properly mine. My father wished to give the boy Milton, to my son James, but I took the deed in my own name, and his grandfather, Patrick, gave to him a boy, Jack, which I sold and received the money. In place of Jack, I give to James the boy Andrew. But should my son make my estate pay on account of the price of Jack, then I direct and will that Andrew shall not pass to James, and his part of my estate shall answer for the price of Jack."

At the time of making this will, James was under age, but became of age before his father died, and then received from his father six hundred dollars, for which he gave the following receipt:

"Received of my father, John A. Foulkes, six hundred dollars, in full payment for a boy Jack, sold by my father; said boy was given me by my grandfather, James Patrick, dec'd. Signed, JAMES F. FOULKES.

Oct. 28, 1852."

Notwithstanding this payment and receipt, the executrix, the plaintiff, assented to James' legacy of the slave Andrew, by hiring him from the said James for a year, and otherwise by treating him as his property.

The bill alleges that plaintiff made this assent in total ignorance of her right; that she did not know she had a right for life in this slave, until a short time before the filing of this bill, when she was advised by counsel that the receiving the money for Jack deprived defendant of his right to Andrew; she made known to the defendant that she had received this information, whereupon he got angry, and taking the slave away from her, carried him to the town of Fayetteville where he lived, and has kept him ever since. She insists that by the

will of her late husband, the plaintiff is entitled to a life-property in Andrew, or in the money paid for Jack, if the defendant insists on keeping Andrew, and that the defendant ought to be put to his election as to that matter; that her act of hiring the slave Andrew, is all the assent she ever gave to the legacy; she admits, however, that she intended to assent to it, but says that she was, at that time, "wholly ignorant of any interest she had or might have, in law or equity, to the boy Andrew," and fully believed that the defendant was entitled to Andrew, notwithstanding he had collected the money for Jack.

The prayer is, that the defendant be compelled to surrender Andrew to her, and account for his hire; or that he be compelled to elect between the sum of six hundred dollars and the slave; and if he prefers taking the latter, that then he shall pay the plaintiff the sum of $600.

There is a prayer also for general relief.

The answer of defendant admits the material allegations in the bill, but says that his father owed him about $1,500 or $1,600 when this sum of $600 was paid; and notwithstanding the receipt which he gave, he says it was understood that the balance, which was for interest, was still to be paid; and that his father told him, shortly before his death, that he had made a provision in his will which he thought would be satisfactory of that claim. He understood him to refer to this bequest of Andrew, and that it was his decided wish that it should stand in lieu of the remainder due as interest of the money collected for Jack.

Replication was taken, and the cause set down for hearing on the bill, answer, and exhibit filed, and sent to this Court.

Morehead, for plaintiff.
Fowle, for defendant.

Pearson, J. The bequest of the slave Andrew to the defendant, is subject to an express condition: "But should my son make my estate pay for the price of Jack, then I direct

that Andrew shall not pass to James," (his son.) In other words: the bequest of this slave to the defendant, is to be void if he exacts from the *estate* the price of Jack. It is true he did not, in the words of the condition, exact the price of Jack from the *estate of the testator*, but he exacted it from the *testator* in his life-time, and, without reference to the learning in regard to *ademption* and *satisfaction*, or revocation, we are strongly inclined to the opinion that this was as much a breach of the condition as if he had waited until after the death of the testator, and consequently that the bequest was defeated by force of an express condition. But however this may be, the plaintiff, by her assent to the legacy, vested the legal title in the defendant; and the question is, does the bill disclose any ground upon which she can ask this Court to undo what she has done, so as to relieve her from the legal effect of her assent?

The bill does not allege that she was ignorant of the provisions of the will; indeed, being executrix, that allegation was hardly open; there is no allegation that she did not know the fact that the testator had paid his son the sum of $600 for the price of Jack; nor is there an allegation that the defendant practiced any fraud, made any misrepresentations, or by artifice took her by surprise, so as to induce her to assent to the legacy; on the contrary, the plaintiff's equity is put on the isolated ground, that when she assented to the legacy, "she was wholly ignorant of any interest she had, or might have, in law or equity, in the boy Andrew."

It is settled, that mere ignorance of law, unless there be some fraud or circumvention, is not a ground for relief in equity, whereby to *set aside* conveyances, or avoid the legal effect of acts which have been done. The equity to *supply defects in conveyances*, the result of ignorance or mistake, so as to *give effect* to the intention of the parties, stands on a different footing; for instance: to remedy a defective execution of a power of appointment, or supply the word "heirs," when the intention was to pass a fee simple, or to give effect to the conveyance of a copy-hold estate when there had been no sur-

render, and the like—all stand on the distinction that relief is asked, to carry into effect that which the parties intended to do, and not undo that which has been done. *McKay* v. *Simpson*, 6 Ire. Eq. 452; *Curtis* v. *Perry*, 6 Ves. 745; *Hart* v. *Roper*, 6 Ire. Eq. 349; 1 Story's Eq. 123; Adams' Eq. 191.

The defendant alleges a counter equity, on the ground that his father did not pay him the interest which had accrued on the price of Jack. There is no proof in regard to it, and it is not involved in the consideration upon which we think the plaintiff has failed to establish an equity.

PER CURIAM. Bill dismissed with costs.

BURTON HATHAWAY, ADM'R., *against* THOMAS H. LEARY, EX'R., AND OTHERS.

A bequest of slaves and other personal property, to the testator's wife and two children, "to remain in joint stock until my children shall have attained the age of twenty-one, then their portion to be set apart to them," conveys a vested interest to the children, the possession of which, however, is to be postponed till their arrival at the age of twenty-one.

Such an estate is not defeated by the death of one of the children before 21, but is recoverable by his personal representative.

CAUSE transmitted from the Court of Equity of Chowan County.

William Bullock died in the County of Chowan, seized and possessed of a considerable estate, consisting of several tracts of land, slaves, and other valuable property, having made and published his last will and testament, which was duly proved by his executor, Thomas H. Leary, the defendant, who alone qualified, his wife the executrix, therein appointed jointly with him, having renounced her right to act. In the will of William Bullock is contained the following clause:

"It is my desire that all the real estate I have, shall be sold, (describing the tracts). It is my will and desire that all

of my negroes, and all other property that I may have, after paying my just debts, may be held in joint stock by my wife and children; that the negroes be hired out annually, and the hire be appropriated to the support of my wife and children; but it is my express will and desire that if the income of my estate should not be sufficient for the support and education of my children, that my negroes shall not be sold for that purpose, but that my family shall confine their expenses to their income; but should it be found that the income of my estate exceeds the expenses of the family, the surplus will be divided among my wife and children, the property herein divised to remain in joint stock until my children shall have attained the age of twenty-one, then their portion shall be set apart to them; or in case my wife should again get married, then, her portion (a child's part) to be set off to her." And by a codicil to the will he adds, "It is my will and desire that in the event of my son Benjamin's portion of the income of my property should not be sufficient to raise and educate him, that my executors raise a sufficient amount to defray the expenses of his education, and that the same be charged to him, and be deducted out of his portion of property."

The testator left two infant children, Isadora and Benjamin. The former intermarried with one Connelly, in Alabama, and died intestate about two years since, not having arrived at the age of twenty-one, and administration was granted on her estate to the plaintiff. The widow of the testator having intermarried with one Hardy, and having her property settled under an ante-nuptial contract, her share has been paid over to her trustee; so she is not interested in this suit. The plaintiff claims the share of Isadora as an interest that vested in her life-time, and alleges that he has often demanded the same of the defendant who has failed to pay it, alleging that some doubt exists as to the proper construction of the will, and suggesting that, as Isadora did not arrive at the age of twenty-one years, the contingency on which she was to take having never occurred, the share never vested in her. The plaintiff alleges that the slaves of the estate were hired out for several

years, and that the income from that source far exceeded the expenses of the family; and that besides the slaves themselves, there is a considerable sum in the hands of the executor to be divided between the plaintiff, as the representative of Isadora, and the son, Benjamin, who had arrived at the age of twenty-one before the bill was filed.

The bill prays for an account of the estate of Wm. Bullock, in the hands of his executor; that the share of the said Isadora may be ascertained and paid to her administrator; also, that commissioners may be appointed to divide the slaves, &c.

The answers of Thos. H. Leary and Benjamin Bullock are filed, admitting the allegations of the bill; but the latter contends that Isadora's interest under their father's will, was contingent, and the event never having occurred upon which it was to become absolute, she takes nothing further than she has received in the way of support and education.

The cause was set down for hearing on the bill, answers and exhibits, and sent to this Court by consent.

Heath and Hines, for plaintiff.
Moore and Smith, for defendants.

Battle, J. It has been too long settled to be now questioned, that in a bequest like the one before us, the interests of the legatees are vested, and if one die before the period of division has arrived, his or her share will devolve upon his or her representative. The subject is so well and so fully discussed in the cases of *Perry* v. *Rhodes*, 2 Murph. Rep. 140; *Clancy* v. *Dickey*, 2 Hawks' Rep. 497, and *Gwyther* v. *Taylor*, 3 Ire. Eq. Rep. 323, referred to by plaintiff's counsel, that it would be a work of supererrogation to make another remark upon it.

Per Curiam. A decree may be drawn in accordance with this opinion.

HENRY S. LLOYD *against* SAMUEL C. WHEATLY.

A specific performance will not be decreed in a Court of Equity, as a matter of course: where, therefore, a contract appears to be unfair, greatly unequal, and oppressive on the side of the defendant, the Court will withhold its aid, and leave the plaintiff to such remedy as he may have in a Court of Law.

CAUSE removed from the Court of Equity of Martin County.

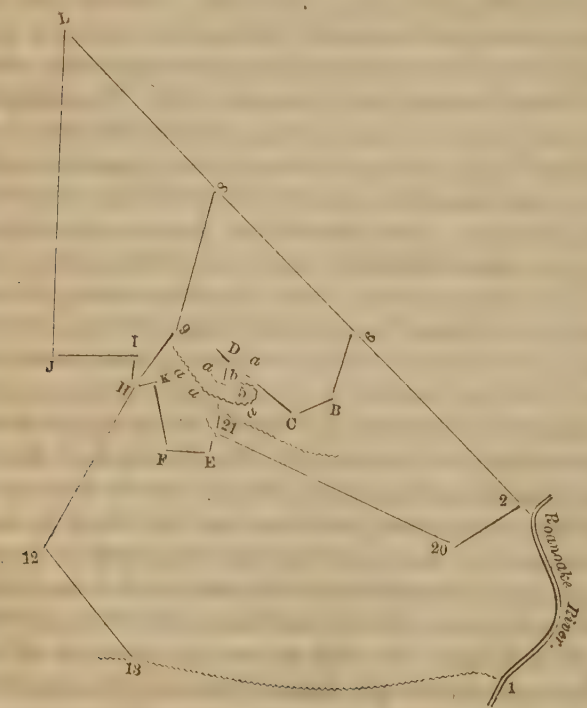
The defendant had the older grant for a tract of land designated in the accompanying diagram as 1, 2, 8, 9, 12, 13, then along a natural boundary to the beginning, and had had, by himself and those under whom he claimed, a continued possession and cultivation of a part of it, ever since a few years after the date of his grant, which was in 1752. The plaintiff had a younger grant for the land described by the lines 8, 6, B, C, D, E, F, K, H, I, J, L, to the beginning; a part of which lapped over upon the older grant of the defendant, as will be seen by the diagram. The plaintiff had brought an action of trespass against the defendant, which was still pending, and was proceeding to procession the land, and while running in upon a portion of the defendant's cultivated lands, with his surveyor and a party of his friends, came to a compromise with the defendant, which was reduced to writing, and is in these words:

"We, Samuel C. Wheatly, and H. S. Lloyd, agree in the presence of Thos. R. Coffield and W. R. Hyman, that a cypress and maple in Beaver-dam slough shall be our corner in the William Slade grant, and then our line shall proceed up along the various courses of the said Beaver-dam slough, as far as the said Wheatly's lands extend; and it is further understood and agreed, that the said Samuel C. Wheatly is to pay said H. S. Lloyd a fair and reasonable price for all the land on the south side of the Beaver-dam slough, covered by the William Slade patent or grant. Done this 4th day of December, 1850. Witness our hands and seals."

HENRY S. LLOYD, [*seal.*]
SAMUEL C. WHEATLY, [*seal*]

Teste, W. R. Hyman.

The cypress and maple corner is at *b*, in the diagram, and the Beaver-dam slough is marked by the letters *a*, *a*, *a*, *a*, *a*. It appears from the plat of the survey filed by the parties, that the lines of the William Slade survey, 6, B, C, D, E, F, K, H, 8, 6, and falling within the plaintiff's land, include 129 acres, 107 of which included by lines 8, 6, B, C, *a*, *a*, *a*, *a*, *a*, 9, 8, are given to plaintiff by this compromise, and 22 acres included by the lines H, K, F, E, *a*, *a*, H, allowed to the defendant, for which he is to pay a "fair and reasonable price."



The bill is filed to compel a specific performance of this contract, by the defendant's making title according to the designated line, and by surrendering possession of the 107 acres, to the plaintiff.

The defendant in his answer says, that although he did sign the contract set forth in the plaintiff's bill, yet, he did so through the misrepresentations, fraud, and overreaching of the plaintiff and others with whom he was combined; that he was acting under a mistake of his rights, brought about by the devices of the plaintiff and his co-adjutors, and under alarm at the idea of losing much of his most valuable land. He says, that although he did not know exactly where his lines ran, yet, he had long believed that they were about where they are now ascertained to be, and that they took in the whole of the lap as exhibited in the diagram; but that very shortly before this contract was made, plaintiff came upon his land under the actual or pretended authority of the law, with his surveyor, one W. R. Hyman, and commenced, as they said, processioning his (defendant's) land, and the second and third lines they ran, were from 2 to 20, and from 20 to 21, and he was assured by the surveyor that that was the only way they could be lawfully run. He says, he supposed these persons knew, and were acting honestly, and it was from these feelings and considerations, as well as from the terror of the law-suit pending against him, that he consented to make the Beaver-dam slough the line between them. He says further, that he has found out that both plaintiff and Hyman knew well that this was not the true way to run the line, and that plaintiff had been told by both Hyman and another surveyor, by the name of Phelps, that the line was to run along the river from 1 to 2, then to 8, then to 9, and then to 12. He insists that he has proved by abundant evidence, documentary as well as oral, that such is the way in which the lines should run; and that, therefore, this compromise is unreasonable, unfair, and oppressive.

Replication was made to the answer, and much evidence taken in the cause; and it being set down for hearing upon the bill, answer, exhibits, proofs, and former orders, was sent to this Court for trial.

Moore, for plaintiff.

Rodman, for defendant.

Battle, J. The equity for a specific performance of a contract, requires that the contract shall have been made for valuable consideration, and that its enforcement in *specie* be practicable and necessary. Adams' Eq. 77. It is not a matter of course, but rests in the sound discretion of the Court, and it may be refused when circumstances render it inequitable or improper. In order to be thus enforced, the agreement must be certain, fair, and just in all its parts. *Leigh* v. *Crump*, 1 Ire. Eq. Rep. 299. Even the mere fact that the contract is a hard one and would press heavily on the defendant, will induce the Court to withhold its aid, and leave the plaintiff to his remedy at law. *King* v. *Hamilton*, 4 Peters' Rep. 311; *Talbot* v. *Ford*, 13 Simon's Rep. 173; Adams' Eq. 84; 1 Story's Eq. Jur. secs. 132, 134, 161.

The application of these principles is decisive against the claim of the plaintiff, in the present case. We say nothing of the uncertainty of the contract. We do not declare that it was obtained from the defendant by fraud, though we do believe that he entered into it under circumstances of surprise and alarm at finding the plaintiff with a surveying party in the midst of his cultivated field. But a contract more unequal between the two parties, and more oppressive upon one of them, it would be difficult to imagine. The testimony of the surveyors, taken in connection with the plat and the accompanying documents, shows clearly that all the land to be affected by the alleged compromise, belonged to the defendant. A part of that the contract requires him to convey to the plaintiff, and permits him to retain the residue, upon paying a fair price for it. And what is he to get in return? Nothing, that we can discover, unless it be an engagement on the part of the plaintiff not to sue him for his own land. It is no part of our duty to encourage law-suits, or to prevent their adjustment when commenced; but we think we can safely say, that the plaintiff has attempted to make the defendant pay rather too dearly to keep out of one. The agreement is not, in our opinion, "certain, fair and just in all its parts,"

and we cannot, therefore, decree its enforcement in this Court.

PER CURIAM. The bill is dismissed with costs.

BRYAN GRIMES, EX'R., *against* JAMES E. HOYT.

A Court of Equity will not interfere to rescind an executed contract, upon the ground that it is illegal and against the policy of the State, where the parties are in *pari delicto;* the maxim in such case being *melior est conditio defendentis*, (with the exception of cases under statutes to protect the citizens of the State against oppression; as for instance, usury):

A bill, therefore, alleging that the owner of a slave conveyed him by a deed absolute on its face, upon a secret trust that the slave should go at large, and act as a free-man without leaving the State, and asking the rescission of the contract and the restoration of the slave, with an account, &c., will not be entertained.

CAUSE removed into this Court from the Court of Equity of Beaufort County.

In 1845, the Rev. Mr. Singletary conveyed to the defendant, by an absolute bill of sale, a slave by the name of Guilford, reciting therein as a consideration, the receipt of $850, with a general warranty of title. The defendant did not pay this sum in money, but in lieu thereof, gave to Mr. Singletary five several sealed notes for $171,62, payable on credits of one, two, three, four, and five years, with a provision in each of said notes, that if the said negro should die, or become permanently disabled before such note became due, payment was only to be made, *pro rata*, up to the time of such event. Mr. Singletary died in less than a year thereafter, having made his last will and testament, wherein the plaintiff, Bryan Grimes, was appointed his executor. The plaintiff proved the will, and qualified as executor.

The bill alleges that plaintiff's testator, being about to remove from the County of Beaufort where he then resided, and being much attached to the slave Guilford, who was an

excellent servant in all respects, for the purpose of enabling him to remain in Beaufort county, where his wife and children lived, and for the purpose of enabling him to purchase himself and be free without leaving the State, with the concurrence of the slave Guilford, and in pursuance of a promise made him, entered into an agreement with the defendant, that he (defendant) "was to have for his own use all the annual profits of the labor of the said slave for five years, and at the end of that time he (Guilford) was either to remain nominally the slave of the defendant, being permitted to have the use of his time and to go at large as a free-man, or defendant was to convey him to his (Guilford's) wife, who was a free woman of color, (at the option of the slave,) for the same purpose; the intention being substantially to emancipate him without his leaving the State. The bill alleges that Guilford was worth a great deal more than $850; and that the object of giving this bill of sale, was to disguise the transaction and evade the laws of the State in relation to the emancipation of slaves. The bill further alleges, that the defendant, having received the profits of the labor of Guilford, who is a carpenter, for five years, by which he has realised $250 a year, or in the whole, $1200, has permitted the said Guilford ever since, and still permits him, to go at large as a free man, and now only holds him in nominal servitude. Nevertheless, he alleges that the defendant has offered to sell the said slave for the sum of $650, with an understanding and agreement, that when the purchaser shall have received that sum, ($650), the slave is to go at large, and enjoy his freedom as he is now doing. The bill further alleges, that some small payments have been made on the notes taken from the defendant, but the same have been renewed by the substitution of two other notes amounting to about $683, which have been on interest for six or eight years.

The plaintiff averring that the said sale to the defendant was merely colorable, and against the policy of the State, offers to surrender the notes now held on the defendant, and the money paid him on the same account; and he prays that the

bill of sale may be declared void, and be surrendered for cancellation; and that the defendant account with him for the hire of the slave since he went into the defendant's possession.

The answer of the defendant denies that he made any such contract or agreement with the plaintiff's testator; but says, after the trade with Mr. Singletary, which was *bona fide*, as evidenced in the bill of sale and the notes, and not upon any illegal trust or understanding, as is pretended by the plaintiff, and after this transfer to him, it is true, he did agree with the slave Guilford himself, that if he would serve him for five years, and would make, by working at his trade, the sum of $1250, that is, $250 per year, for that time, that he would liberate him; but denies that this emancipation was to be done in any other mode than that permitted by the law of the State.

There was replication to the answer, and the cause set for hearing upon the bill and answer.

Rodman and *Donnell*, for the plaintiff.
Sparrow, for the defendant.

NASH, C. J. The bill is filed to rescind a contract. It states that the testator, Mr. Singletary, who was the owner of a slave by the name of Guilford, to whom he was much attached, and being about to remove out of the county of Beaufort, where he then resided, "agreed with said slave, to convey him to any person whom the said slave should select, who would agree to pay said Singletary, a certain sum in annual payments, for a certain time, out of the profits of the labor of the said slave; and after the expiration of that time, to permit the said slave to go at large, and act as a free-man, and who should, nominally only, be his master. This arrangement was considered by the said Singletary as an act of bounty to the said slave, and the object was to emancipate him, &c., and still leave him to reside in the State." The bill states that a contract was made between plaintiff's testator and the defend-

ant, to carry out this intention. Hoyt gave to the testator his bonds for the stipulated price, to wit: $850, divided into five annual payments, and the latter conveyed the slave to the former by a deed, absolute on its face.

The answer denies that the contract was such as is set forth in the bill, but claims Guilford by an absolute purchase. The answer, however, contains statements which strongly corroborate the allegations in the bill, and are inconsistent with any other. The enquiry is, does the bill state such a case as authorises the inteference of a Court of Equity? We think it does not. The object of the testator was a benevolent one; but the mode resorted to, is contrary to the well-known policy of the State. There are three ways in which slaves can be emancipated, viz: by the judgment of a Court of record, Rev. Stat. ch. 111, sec. 57; or by the owner taking, or sending them out of this, to a free State; or by the Legislature. In neither of the two first cases can the slaves remain in the State, and only by a legislative act can that privilege be obtained. It is in direct violation of the policy of the State, to suffer a slave, upon his emancipation, to remain in the State; and this Court, in various cases, have declared that secret trusts, such as the bill sets forth, are null and void. See *Thompson* v. *Newlin*, 3 Ire. Eq. 338; *Huckaby* v. *Jones*, 2 Hawks 120; *Stevens* v. *Ely*, 1 Dev. Eq. 493; *Lemmond* v. *Peoples*, 6 Ire. Eq. 137. These cases establish the general principle, that a secret trust for the emancipation of a slave, whether by voluntary deed or will, is void, and a trust results in the latter case to the next of kin of the testator, and in the others, to the grantors. Those cases, however, do not control this; in each of them the conveyance was a voluntary donation. Here, it is a conveyance upon a full and valuable consideration, to wit, $850, for a slave forty-five years old. Huckaby's case was under a will, in which the Court say, the legatees to whom the property was willed, were trustees only, and the purpose of the trust, the emancipation of the slaves. This was an illegal trust, as the slaves were to remain in the State, and the legacy, a mere donation. In Ely's case the conveyance of the

slaves was a donation, two slaves being conveyed for £5. The trust was expressed upon the face of the deed, and for a *quasi* emancipation. The trust in the case of Peoples also arose under a voluntary conveyance for the same secret purpose. The error of the parties consisted in not attending to the difference between a secret trust, of the nature we are discussing, accompanying a voluntary conveyance where the trustee has no interest in the slaves conveyed, and one where the conveyance is for a valuable consideration, conferring an interest in the trustee. In the latter case, where the object and purpose is to secure to the slave, what is termed a *quasi* emancipation, the parties are *in pari delicto*, and Equity stands neuter between them; it being a maxim of equity, *in pari delicto*, *potior est conditio defendentis*. Equity will lend its aid, neither to enforce, nor to cancel, the contract, but leave the parties to contest their legal rights, if any they have, in a Court of Law. It is a maxim of law, *ex turpi causa non oritur actio;* if, therefore, a contract be made, so tainted, while it remains executory, Equity will not interfere where its invalidity appears upon its face; because a Court of law is competent to take notice of it; but if its invalidity does not so appear, it will give relief. But the Court will not interfere to rescind, where the contract is executed, by reason of the maxim *in pari delicto*, &c. Here, the contract was executed; the testator had conveyed the slave Guilford to the defendant, Hoyt, who took possession of him and executed his bonds for the price agreed on. This rule, however, does not apply to contracts made in violation of a statute to protect the citizen from oppression, and the oppressed party is asking relief, as in the case of usury; for, in such a case, though the complainant has joined in violating the law, he is not considered *in pari delicto*. Adams' Eq. 349; 2 Story's Eq. sec. 700; 1 Story's Eq. sec. 298.

A contract made in violation of the public policy is considered a constructive fraud, as not originating in any actual or positive evil design. 1 Story 258. It is not intended to cast upon the parties the slightest charge of any moral delinquen-

cy. The vendor here was actuated by a pure and benevolent motive; he resorted to a mode not sanctioned by the law. In the language of Judge Henderson in Ely's case, "the act is forbidden only by the stern policy of the State, necessary to support our institutions in regard to slaves; but there is nothing *malum in se* in the act."

The Court cannot grant the relief asked, and the bill is dismissed.

PER CURIAM. Decree accordingly.

W. F. BROOKSHIRE AND OTHERS *against* A. H. DUBOSE AND OTHERS.

It is a general doctrine of the common law recognised in this State, that no suit can be brought, or maintained, by any executor, or administrator, or against any executor, or administrator, in his official capacity, in the Courts of any other country or State, except that from which he derives his authority to act, in virtue of the probate and letters testamentary, or the letters of administration there granted to him.

This principle is not varied by the fact that a part of the assets of an estate have been recovered by an administrator appointed in another State, suing in his individual capacity in a Court in this State upon promises made him by the defendant, and by such defendant seeking to enjoin the judgment.

APPEAL from an interlocutory decree of the Court of Equity of Randolph County, at its last Fall Term, his Honor, Judge CALDWELL, presiding.

The facts of this case are set forth in the opinion of the Court.

Gilmer and *Miller*, for plaintiffs.

Bryan, for defendants, argued as follows: What Equity has the plaintiff to retain the amount received, or to a set off against it?

The money was the individual property of Dubose; the negro which he had bought of Newby, (by his agent Brookshire,

the plaintiff,) had been recovered from him, and this was the consideration money he had paid, to which he was entitled upon every principle of equity and good faith; this money was in the hands of plaintiff, and he had received it as the agent of Dubose.

The plaintiff claimed that he was entitled to the balance of a distributive share in the hands of defendant, as administrator of William Brookshire. The defendant, if liable on this ground, is only liable *as administrator*, and his assets can only be administered according to the laws of Alabama; this involves the rights of creditors and the question of assets, priorities, &c., which can only be adjusted by the local law. Next of kin can only claim according to the *lex loci.*

No suit can be brought to charge defendant as administrator in the Courts of any country except that from which he derives his authority to act. Story's Con. Laws, sec. 513, *et seq.*

Plaintiff is bound to establish his claim judicially in the first place. 1 Paige 622; *Sellers* v. *Bryan*, 2 Dev. Eq. 361.

To authorize a set off in Equity as well as at law (the debt being ascertained) there must be mutuality—mutual debts and mutual credits. 2 Story's Eq. sec. 1436; 21 Eng. L. and E. 546; 23 do. 457; 5 Mason 201; *Bunting* v. *Ricks*, 2 Dev. and Bat. Eq. 130.

If available, it was as much available at Law as in Equity.

Battle, J. This case comes before us upon an appeal from an interlocutory order dissolving an injunction which had been granted upon the filing of the bill. The only facts necessary to be stated are as follows: William Brookshire died intestate, in Clarke County, Alabama, in the year 1842, and letters of administration were granted to the defendant, Abel H. Dubose, by the Probate Court of that County. The intestate left no wife or issue, and the plaintiffs and defendants, other than the administrator, are his next of kin, and as such, entitled, under the laws of Alabama, to a distribution of his

estate. In the latter part of the year 1844, the plaintiff, Willie F. Brookshire, went to the State of Alabama with powers of attorney from the other next of kin, to demand a settlement with the defendant, Dubose, as administrator, and to receive from him the shares of the intestate's estate, to which he and they were entitled. While there, he was induced, as he states, by the fraudulent representations of the administrator, to receive for himself and his principals, much less than was really due to him and them, thus leaving, upon a full and fair settlement, a large balance still due to each of them. The bill then states that the plaintiff, Willie F. Brookshire, "received for Thomas Newby and wife $400, and brought the same with him to Randolph County, North Carolina, where he resided; the said Newby and wife residing in Indiana; that the said Newby and wife having peculiar notions on the subject of slavery, became desirous to get one of the slaves belonging to the estate, for the purpose of emancipating him, and caused suit to be brought against the said Dubose in Alabama, for the slave allotted to them, and recovered him; that fearing the receipt of the $400, in the hands of the said Willie, might affect them in their suit for the slave, they refused to take the money, or any part of it, but permitted it to remain in his hands; but, that after they succeeded in their suit, they demanded the said money of the said Willie, as being a part of their share of the estate of William Brookshire, over and above the negro which they had recovered. That the defendant, Dubose, forbade him, the said Willie, to pay the money to Newby and wife, and brought suit for the same in Randoph Superior Court of law, and recovered a judgment for it at the Fall Term, 1853, upon proof of the oral and written declarations of the said Willie, that Newby and wife had refused to receive the said money, and that he was willing to repay it to the said Dubose." The prayer of the bill was for an account and settlement, and until that could be had, for an injunction against the judgment at law. Upon the coming in of the answer of the defendant, Dubose, the facts stated in which, it is unnecessary to set forth, further than that it denied that any thing was due

the plaintiffs, and insisted that the estate of the intestate had been fully settled, and a decree to that effect entered in the Probate Court in Alabama—the injunction was dissolved, and from the interlocutory order, the plaintiff, Willie F. Brookshire, appealed.

We are clearly satisfied that the bill cannot be sustained at all, and the order dissolving the injunction was therefore proper. Mr. Justice Story, in his admirable work on the conflict of laws, in discussing the subject of a suit by or against a foreign executor or administrator, says, "It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator in his official capacity, in the Courts of any other country, except that from which he derives his authority to act, in virtue of the probate and letters testamentary, or the letters of administration there granted to him. But if he desires to maintain any suit in any foreign country, he must obtain new letters of administration, and give new security according to the general rules of law prescribed in that country, before the suit is brought. So, on the other hand, if a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate, situated therein, it will be necessary that letters of administration should be there taken out, in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country, is not suable there, and has no positive right to, or authority over, those assets; neither is he responsible therefor." Story's Con. of Laws, 3rd Ed. sec 513. For this the learned author cites many cases, the authority of which, as establishing the general rule, the plaintiff's counsel does not dispute. But he contends that the present case is an exception, for the reason, that the administrator came into this State, and instituted a suit in one of our Courts for the collection of a part of the assets. This, he says, has conferred upon our Courts a jurisdiction to call upon the administrator for a full account and settlement of the

whole estate of his intestate. The reply is obvious and conclusive. The administrator sued, and could sue, here, only in his individual, and not in his representative, capacity. The defendant in the suit at law held money in his hands, which, after the refusal of Newby and wife to receive it, he declared to belong to the plaintiff in that suit, and expressed his willingness to repay it. Having received the money in Alabama, from the administrator, for another person, without sufficient authority, as it appeared, to do so, he was bound in conscience as well as by law, to return it to him; and it would be conceding rather too much to him, that his breach of good faith, which compelled the administrator to sue him in his individual capacity, could give him the right to drag the administrator from his own Courts into ours, for the purpose of compelling him to render a full account of his administration in our Courts. Thinking, as we do, that our Courts have no jurisdiction to entertain the bill, we direct the interlocutory order to be affirmed with costs, without adverting to any other question discussed by the counsel.

PER CURIAM. Decree accordingly.

OLIVER BRAME AND OTHERS *against* ANDERSON F. BRAME.

Where one is entitled to a contingent interest in two slaves, under a deed, and afterwards the same grantor makes another deed, conveying the same slaves and much other property in trust for the prior grantee and others, giving an indefeasible interest in the whole to each one, and such prior grantee acts as trustee, sells all the other property but the two slaves, distributes the proceeds, and takes his share of them, it was *Held* that he was to be considered as having abandoned his claims under the former deed, and, therefore, that the two slaves must be sold under the second deed, and distributed as the other property had been.

APPEAL from a decree made by his Honor, Judge CALDWELL, in the Court of Equity of Warren County, at its Fall Term, 1855.

William Brame, the father of the plaintiffs and the defendant, in August, 1826, executed the following deed, viz:

"Know all men by these presents, that I, William Brame, of the County of Warren, and State of North Carolina, for the good will, love and affection which I have and bear to my wife, Nancy Brame, and my children, Anderson F. Brame, Henry Brame, James Brame, Oliver Brame, Susan Brame, Sally Brame, William Brame, Anne Brame, and Marcus Brame, and for the further consideration of one dollar to him in hand paid by the said Anderson F. Brame and Henry Brame, trustees by me appointed, the receipt whereof I do hereby acknowledge, have bargained and sold to the said Anderson F. Brame and Henry Brame, their heirs, executors and assigns, the following negro slaves, to wit, Tab, Will, Milly, Henderson, young Tab, John, Silva and Peter, with the further increase of the said female slaves to them," &c., with a clause of warranty. "In trust, nevertheless, first: the aforesaid trustees are to permit my wife Nancy to use and enjoy the profits of the said slaves for her support, and the support and maintenance of my three daughters, Susan, Sally and Anne, for and during the natural life of my said wife Nancy; and after her death, the said trustees are to distribute the aforesaid negro slaves, and the future increase of the females thereof, as follows: to each of my children before mentioned, *equally, share and share alike*; and for the purpose of making this distribution, as the said Anderson and Henry will be interested, my friend, Henry Fitts, shall appoint three persons to divide the said negroes, and that division shall be good. The part that shall be divided to my son Oliver Brame, he is not to take, but his part is to be retained and taken into possession by the said Anderson F. Brame and Henry Brame, (in trust for the support of Oliver, during his life,) and after the death of said Oliver, what remains in the hands of the trustees is to be equally divided amongst the rest of the children.

"Two of the above conveyed negroes, John and Silva, are now in the possession of Anderson F. Brame, which negroes,

said Anderson is to keep possession of until the death of my said wife, Nancy, and myself."

In March, 1821, the donor had made to Anderson F. Brame, a deed for a tract of land containing 210 acres, reciting a consideration of $900 as well as natural love and affection, (describing it,) the *habendum* of which is as follows: "to have and to hold the said tract or parcel of land, with the appurtenances thereunto belonging, unto the said Anderson, his heirs and assigns, to the proper use and behoof of him, the said Anderson, his heirs and assigns forever, from and after the death of the said William, and Nancy Brame, his wife," with a clause of general warranty superadded. The deed then proceeds: "And the said William doth further covenant and agree with the said Anderson, that for and in consideration of the said Anderson's permitting him, the said William, to have, hold, and enjoy the premises herein contained, for and during the natural life of the said William, and Nancy, his wife, that the said Anderson, or his assigns, shall have, hold, and enjoy, during the natural life of him, the said Anderson, a certain tract or parcel of land adjoining the above, [describing it,] containing 87½ acres, more or less, together with two negroes, to wit, John, a negro boy, and Silva, a negro woman, upon condition nevertheless, that if at any time hereafter, the said William should be disposed to relinquish and quit claim to the said Anderson, of all the interest reserved to him, the said William, in the two hundred and ten acres above mentioned, then the interest and estate of the said Anderson in the 87½ acres above mentioned, and the two negroes, viz., John and Silva, to cease, and the property to return to the said William."

Nancy, the wife of the grantor, died in the month of July, 1846, and William, the grantor, died in the year 1850. In the winter following the death of Mrs. Brame, by consent of all the parties, all the said slaves, except John and Silva, were sold by the trustees, and the proceeds distributed among the children of William Brame, as above enumerated, except the share of Marcus, who had died intestate before that time, and

his share was retained by Anderson, one of the trustees. The plaintiffs and defendant are his next of kin. At the time of the sale of the slaves, John and Silva were not sold, owing to some opposition by the defendant Anderson F. Brame. About six months after the death of Mr. Brame, the woman Silva died. Silva had remained in the possession of the defendant Anderson, up to the time of her death, and John has remained in his possession up to the present time, used and claimed by him. The bill was filed on 26th September, 1854.

The plaintiffs allege that the slave John has been profitable, and made large gains for the defendant; that shortly before this suit was brought, they called upon him to make sale of the slave John, and distribute the proceeds according to the deed in trust; but he has refused to do so, claiming him as his own. The prayer of the bill is for an account of the hires of John and Silva, and also for the value of Silva, whom he ought to have sold before the time of her death; that John be surrendered, to be sold, and the proceeds divided according to the deed of 1826, and for general relief.

The answer of the defendant sets up the deed of 1821, and also insists upon the statute of limitations.

Plaintiffs, anticipating the first ground of defense, urged in their bill, that the defendant, having acted as trustee under the deed of 1826, by selling the property and distributing the proceeds according to the provisions of that deed, and having also himself, taken a benefit under it, is estopped from setting up the former inconsistent deed of 1821.

There was replication to the answer.

The cause was set for hearing on the bill, answer, former orders and exhibits; and coming on to be heard, his Honor declared his opinion to be in favor of the plaintiffs, and decreed accordingly. From which judgment defendant appealed.

Moore and *Eaton*, for plaintiffs.
Miller, for defendant.

Pearson, J. By the deed of 1826, sundry slaves, includ-

ing John and Silva, were conveyed to the defendant, in trust, to divide them among the children of the donor, after the death of his wife, with an express reservation of the use of the slaves John and Silva to the defendant, during the life of the donor and his wife. The defendant was a party to this deed, acted under it as trustee, sold all the slaves, except John and Silva, in pursuance of its provisions, and divided the proceeds of the sale among the children of the donor, retaining a share, (he being one of the children).

Now, apart from the doctrine of election, upon which there is much learning, and according to which, if a testator, or donor, give to A, the property of B, and give to B, other property of the testator or donor, the latter is not allowed to claim the bounty of the testator, or donor, and also to set up claim to his own property, whereby to disappoint the bounty intended for A, the idea that the defendant can, after acting under, and taking benefit from, the deed of 1826, be allowed to set up claim to the two slaves, John and Silva, under the deed of 1821, shocks all notions of common honesty, and, as is said in *Sasser* v. *Jones*, 3 Ire. Eq. 19, amounts to a gross, and palpable fraud.

We are not, however, driven, as in *Sasser* v. *Jones*, to the necessity of imputing to the defendant actual fraud, and prefer to reconcile the matter in this way; i. e., the reservation to the defendant, in the deed of 1826, of an estate for the life of the donor and his wife, was accepted, and considered by the defendant, together with his share in the division under that deed, as a fair equivalent for the estate during his *own* life, to which he was entitled under the deed of 1821, but which was subject to a condition. In other words; he was willing, and did surrender an estate for his own life, which was subject to a condition, in consideration of an absolute estate for the lives of his parents, or the longest liver, in addition to a child's part in the entire fund. This makes the whole matter work together; leaves no reflection upon the honesty of the parties; and carries the intention into effect.

It is familiar doctrine, if one stand by and see another buy

property to which he has a claim, and pay a fair price for it, he shall not afterwards be allowed to dispute the title, because he cannot do so without being guilty of a fraud. Our case is stronger than that; for the defendant is a party to the deed; acts under it as trustee, and receives a part of the fund. We are satisfied, therefore, that the deed of 1826, by the understanding of the parties, supersedes the deed of 1821; and that the estate for his own life, subject to a condition, was surrendered, or exchanged, by the defendant, for an estate for the life of his father and mother, or of the longest liver, in consideration of his being allowed to take a full share as one of the children. As the defendant was entitled to Silva and John, until the death of both his father und mother, the fact that they were not sold at the death of the mother, when the other slaves were sold, is fully accounted for, and puts the idea of an adverse claim, so as to bring into operation the statute of limitations, out of the question; and as Silva died so soon after the death of the donor, we think the defendant was not guilty of laches, so as to charge him with her value.

In short, we concur with his Honor in the view taken by him in regard to the whole case, and the decree must be in all respects affirmed.

PER CURIAM. Decree accordingly.

JOSEPH PATTON *against* ROBERT THOMPSON.

Where a trustee buys at his own sale, even though he may give a fair price, the *cestui que trust* has his election to treat the sale as a nullity, not because there *is*, but because there *may be* fraud. Therefore:

A guardian who petitions for the sale of his ward's estate, gets an order of sale, acts as the agent of the clerk and master in making it, cries the sale, takes the bonds, and gives the information to the clerk and master, on which the report is made and the sale confirmed, will not be allowed to hold the land of his ward, purchased by another for him at such a sale.

CAUSE removed from the Court of Equity of Alamance.

The bill was filed to compel the defendant to bring in a deed for cancellation, and for an account of the rents, &c.

Joseph Patton was a lunatic, to whom the defendant was guardian; he had a few articles of personal property of small value, and a tract of land containing sixty acres, worth between five hundred and a thousand dollars, and no other means of subsistence. In 1848, the guardian filed a petition in the Court of Equity of Orange, (then having jurisdiction), stating that the proceeds of the land and other property were insufficient to support the ward, and that it was necessary to sell the land; whereupon, that Court made a decree that the sale should be made, and appointed the clerk and master of that Court to make it, on a credit of six and twelve months. The master advertised the land, and sold the same to one John Stewart, for $499, the defendant acting as his agent in crying the sale at auction, and in taking the bonds. Upon the coming in of the master's report, opposition to the confirmation of the sale was made, and it was continued for one term. Afterwards, it was confirmed, and in the mean time the new county of Alamance having been laid off, and having taken jurisdiction of the matter, the sale was, in that Court, ordered to be confirmed. At the Spring Term, 1850, of the Court of Equity of Alamance, an order was made "that the master transfer to Robert Thompson, the guardian, the bonds for which the land was sold, to be applied by the said guardian to the use of his ward; and that the master of this Court make title to the purchaser." The bonds were accordingly delivered to the defendant; and in June, 1850, the clerk and master of that Court made a deed for the premises, to the purchaser, John Stewart. On the 20th September following, Stewart conveyed the same land to the defendant, for the consideration of $666, as expressed in the deed. No money was paid by Stewart on obtaining the deed, nor did defendant advance any thing to Stewart for his bargain; but the consideration on which Stewart conveyed to defendant, was a surrender of his (Stewart's) bonds by the defendant. The clerk and master delivered the deed for the purchaser, to the defendant, at the

same time that he delivered him the bonds under the order of the Court.

The plaintiff alleged in his bill, that this sale of the ward's land was unnecessary; that divers of his friends had proffered to take the lunatic and land, and support him off of it; that defendant acted as agent to sell the land, and that in appointing a day of sale, he selected one on which there was a large gathering in the neighborhood, and most of the persons who might compete for the land were gone there. He alleges that the defendant did not advertise; that he did not state the full number of acres in the tract; and that he spoke doubtingly of the title; that he acted as crier of the sale; that he had procured Stewart to bid off the land for him; and when it came to the bid at which he knocked it off, he did so hurriedly, and in a way to prevent further competition. It was further alleged, that the land was worth from $1000 to $1200. The bill charges that the land adjoined the lands of the defendant, and was very much desired by him, and that in all this proceeding he was actuated by the fraudulent design of getting the land at an undervalue, and that he finally succeeded in doing so. The prayer is for a surrender of the land, and an account; also that the deed be surrendered for cancellation, and for general relief.

The defendant denies, in his answer, all these allegations, except that he told Stewart, and he says he told others, to bid, and that if they did not like their purchase, he would take it off their hands. He says that he did this solely from an anxiety to make the land bring its value. He also insists that the sum agreed to be paid for the land is its full value; and that this bill has been brought against him, not from any belief that he has got it too low, or that he has acted unfairly, but from an idea that a valuable copper vein has been discovered in close proximity to it, which is supposed to extend into it.

There was replication, and a large amount of proof taken, the material part of which is noticed in the opinion of the Court. The cause was set down for hearing, upon the bill, answer, exhibits and proofs, and sent to this Court for trial.

Winston, Sr., for plaintiff.
Graham, for defendant.

PEARSON, J. "It is an inflexible rule, that where a trustee buys at his own sale, even though he give a fair price, the *cestui que trust* has his election to treat the sale as a nullity; not because *there is*, but because *there may be, fraud.*" *Brothers* v. *Brothers*, 7 Ire. Eq. 150. So, there is no question as to the principle of equity which the bill seeks to enforce. Our question is one of facts merely, i. e., do the proofs establish as many of the allegations of the bill, as are necessary to bring the case within the operation of the rule?

The allegations tending to show *actual* fraud, as that the sale was not duly advertised, competition was suppressed, &c., are not sustained by the proof, and must be put out of the case; but these facts are proven, i. e., the defendant was the guardian of the plaintiff; he conducted, and had the entire control of, the sale, and reported to the Court that one Stewart was the purchaser; the sale was confirmed, and, by order of the Court, title was made to Stewart, who thereupon conveyed to the defendant, upon a surrender of the notes which he had given for the purchase money; Stewart bought by reason of an assurance on the part of the defendant, that if he did not like his bargain, he (the defendant) would take it off his hands. Stewart had no expectation or belief that he would like his bargain; for the land (some fifty or sixty acres) had no house upon it, no water, and was unfit for his purpose, unless he could get some land adjoining, which he knew he could not do; whereas, it suited the defendant precisely; he owning land adjoining, to which this land would be a very desirable accession. So, we have no doubt as to the truth of the allegation, that Stewart acted merely as the agent of the defendant, for the purpose of buying the land for him; and that the defendant, being well aware that, according to the "inflexible rule" above announced, he could not become the purchaser directly, attempted to effect his purpose indirectly, by the instrumentality of Stewart; and we have no doubt that the

defendant, in consequence of his desire to become the owner of the land, authorised Stewart, and that he did bid more for the land than any other person was willing, under the conditions of sale, and the state of the property, to give for it. But the defendant knew he had this advantage over any other person who wished to buy: that, being guardian, he would not be compelled to pay the price according to the terms of sale, and "might take his own time;" and the result has been, according to the direct allegation of the bill, that the defendant has not, up to this time, been required to pay the amount bid for the land.

If the allegation, that, in point of fact, Stewart bought the land for the defendant, needed any further confirmation, the defendant has supplied it by the testimony of one of his own witnesses, viz., *James T. Hunter*, who swears in substance, that the defendant requested him to attend the sale, and buy the land, with the assurance that if he did not like his bargain, he (defendant) would take it off his hands, provided it did not go over $500, telling him he thought the land was worth four or five hundred dollars. Witness attended the sale, and bid so as to run the land up to above $400, with the expectation that if he became the purchaser, the defendant would take it, as he knew it would not suit him, because there was no water on it, and very little wood, and there was no chance of buying any adjoining land.

The position taken for the defendant, that this being a sale by order of a Court of Equity, and the sale being *confirmed by the Court*, makes an exception to the general rule above announced, and is to be considered *res adjudicata*, does not apply to this case; because here, the Court had no notice that the guardian was in fact the purchaser.

We are, therefore, not at liberty to express an opinion whether such an exception can be allowed; but we will say this, if it is allowed at all, it should be done with extreme caution, and only under very peculiar circumstances. Who but the guardian can be relied on to show the property to persons wishing to buy, and to take the steps necessary to make it

bring a fair price? Who but the guardian can the Court look to for information, as to whether the matters have been conducted in such a way as to bring the property to sale under the most advantageous terms, and that in fact it did sell for a fair price?

It must be declared to be the opinion of this Court, that the defendant holds the title as trustee for the plaintiff, and there must be an account as to the rents and profits, making allowance for any necessary and permanent improvements. It is proper also to say, this proceeding makes it necessary for the Court of Alamance county to appoint some other person to take charge of the plaintiff and his interests, in the room and stead of the defendant.

PER CURIAM. Decree accordingly.

DANIEL DELAP AND OTHERS *against* ROBERT DELAP AND OTHERS.

A testator bequeathed a female slave and her "offspring" to his second wife during widowhood, then to such of his children of that marriage as the slaves might think fit to live with; and in another clause he provides that the offspring of the slave is to be divided among the children of that marriage. The female slave, and the only daughter of her's, died during the widowhood, the latter leaving several children, *Held* that on the termination of the widowhood, the grand-children of the female slave, whether born before or after the death of the testator, passed under the description of "offspring" to the children of the second marriage, and that the privilege of choosing an owner from among these designated legatees, should be exercised by the legatees themselves, and if they could not agree, the executor might deliver the slaves to them to be held in common.

CAUSE removed from the Court of Equity of Davidson County.

The executor of the will of John Delap, filed this bill, asking the advice and direction of the Court of Equity, upon questions growing out of the will, which is as follows: "I give and bequeath to my well-beloved wife, Margaret, the

whole of my landed property not otherwise disposed of; all the household and kitchen furniture of every description; my negro man Tony, and my negro woman Elizabeth; all to be her's during her life-time or widowhood, and after her death, or marriage, all to be exposed to public sale by my executor, on a reasonable credit, and the money arising from the sale thereof, and the offspring of the said negro woman (if any) to be equally divided among my children by my present wife. It is here to be understood, that it is my will and desire, that after the death or marriage of my wife, the said Elizabeth and her daughter Milly are not to be sold, but to live with some of my children by my present wife, which ever they may think fit."

The testator, John Delap, was twice married, and left children surviving him by both marriages. Joseph, Felix, Robert, Barnabas, and Susannah, intermarried with Joseph Miller, are the children of the second marriage. Margaret, the testator's last wife, survived him, and remained his widow until some time in the year ——, when she intermarried with one Jonathan Wilson. They are both made defendants to this bill. The other defendants are Robert and Barnabas of the second marriage, and all the children of the first marriage, with the husbands of the female children who have married.

The negro woman Elizabeth, mentioned above, and her daughter Milly, both died during the widowhood of Margaret. Milly left two children, which, since the marriage of the widow with Wilson, have been, and still are, in the executor's possession.

The executor states in his bill, that differences exist among the next of kin and legatees of the testator, as to the proper legal construction of the foregoing clause of the will. The children of the second marriage claim to be entitled to the issue of Milly, to the exclusion of the children of the former marriage, insisting that the increase of Milly is included in the idea of the *offspring* of Elizabeth, and that they should be permitted to select their owner or owners among the children of the second marriage, who should pay a fair price for them;

or should be sold, and the money divided amongst this set of children. The children of the former marriage, on the other hand, insist that, as to the increase in question of the woman Milly, the testator, John Delap, died intestate, and that it should be distributed under the Act of Assembly applicable to such cases. He calls upon the persons thus differing, and embarrassing his action with their doubts, to come forward and litigate them in this Court; and he prays the advice and direction of the Court in the premises.

The defendants having failed to answer, judgment *pro confesso* is entered as to them; and the cause being set down for hearing, *ex parte*, on the bill and exhibits, was sent to this Court, under the Act of Assembly.

Kittrell and *Miller*, for plaintiffs.
Gilmer, for defendants.

Battle, J. The pleadings do not show whether the children of the woman, Milly, were born after or before the death of the testator. If before, then they belong undoubtedly to the testator's children by his last wife; because Milly herself was given to them after the death or marriage of the widow. If after, even then, we think that they are given the same way, under the description of the offspring of the woman Elizabeth, who was the mother of Milly. In support of this construction, it will be observed that Milly herself is bequeathed at first under the designation of Elizabeth's offspring, and her name is mentioned afterwards, only for the purpose of declaring that she and her mother were not to be sold with the other property which had been given to the testator's wife during her life or widowhood, and that they were to have the privilege of selecting, among the designated legatees, the person with whom they might think fit to live. The word "offspring" will include grand-children as well as children, unless there be some other expressions in the will, indicative of a contrary intention, and we cannot find any such in the present will.

It has already been seen that the testator intended that his women, Elizabeth and Milly, should not be sold, but should have the privilege of selecting their owner, from among the children of his last wife. The same favor, except perhaps in the particular of choosing their master, was, we think, intended to be conferred upon Milly's children. See *Washington* v. *Blount*, 8 Ire. Eq. 253. The mother and grand-mother being dead, and of course incapable of choosing for themselves or their offspring, the executor may permit one or more of the legatees, selected by and among themselves, to take the slaves in question, upon paying a fair price for them. If the legatees cannot agree upon the person or persons to take them upon those terms, then, the executor may deliver the slaves to them, to be held in common.

PER CURIAM. A decree may be drawn in accordance with this opinion.

GILES MEBANE, EX'R., *against* THOMAS WOMACK AND WIFE AND OTHERS.

Where property is given by will to a mother for life, then to her children, and on failure of children to others, with a provision that it shall be valued, and the value deducted from a share left to her by the same will in the division of a general fund, it appearing to be the intention of the testator to make the families of his several children equal, the value of the fee simple in the land, and the entire estate in the personal property must be charged against the mother in the general divison.

Where there is a limitation over of personal property, by will, after the death of a legatee for life, and such legatee dies before the testator, *Held* that the ulterior bequest must take effect, although the estate of the first legatee never vested.

Where children are named in a will specifically, they cannot take as a class, and therefore, the legacy of one so named, who dies before the testator, lapses, and the rest of the children cannot take it.

CAUSE removed from the Court of Equity of Caswell County.

Mrs. Anne Yancy died in Caswell county in the year ——, having made and published her last will and testament, of which the following is a copy of the material parts:

"2. I give and bequeath to my grand-daughter Frances Ann McAden, the following slaves, to wit, Grandison and Ned, Alexander and Emeline, Anne and Dolly; these slaves I bequeath to her for life, with remainder to her children, if she should have any; if not, then to her brothers; and in this bequest I mean to include any increase which may hereafter arise from the above named slaves.

3. I give and bequeath to my grand-daughter Betsy Ann Mebane, daughter of Giles Mebane, a negro girl by the name of Harriet, together with her future increase, for her life only, and after death, to her children, should she have any, and in default of children, then to her brothers and sisters.

4. I give and bequeath to my daughter Anne Elizabeth Yancy, the tract of land on which I now reside, lying on the main road leading from Yancyville to Greensboro', supposed to contain between five and six hundred acres, including the piece which I purchased recently from John A. Graves, to have the same during her life only, and after her death, I give it to her children, if she should have any, and in default of children, then to my grand-daughter Frances Ann McAden. I direct that the said land shall be received by my said daughter at valuation, the value to be ascertained by three competent persons to be chosen by my said daughter and my executor; but in ascertaining the value, my will is that the buildings, that is, the dwelling house and necessary out-houses, shall not be included. * * * I also give to my daughter Ann Elizabeth, two negroes, Oscar and Susan, to be taken by her at valuation, the value to be ascertained as herein directed in regard to the land given to her; and the said negroes and their futuure increase to be held for and during her life only, with remainder to her children if she should have any, and on failure of children, then to Frances Ann McAden during her life, and upon her dying without children, then to her brothers and sisters. * * * * *

6. Having heretofore placed in the possession of my deceased son, A. S. Yancy, a negro boy by the name of Iverson, I do hereby give him to the surviving daughter of my deceased son, Ann E. Yancy, at the value or price of $300, to have the said negro for her life only, and if she dies without children, then to be equally divided among my own children and grand-children; the grand-children in said division to represent, or to stand in place of, their parents. To my daughter Mary Mebane, I give a negro girl Keziah, valued by me at $250; to my daughter Ann Elizabeth, a girl by the name of Lettice, of the same value; and to my executor, for the separate use of Virginia B. Swepson, a girl by the name of Malinda, of the same value; and whatever increase may have arisen from the said slaves since they were placed in the possession of my daughters above named, I give and dispose of as I have given and disposed of the parents of such children, or increase, and without any additional charge or valuation for such increase; and I hereby direct the property bequeathed in this clause, to be held by the tenure and upon the limitations hereinafter specified in the residuary clause of this will.

"All the rest and residue of my property and estate, I will and direct to be equally divided into five equal shares, or portions, and allotted to my children and grand-children, as follows: one-fifth part to my daughter Mary Catharine, the wife of Giles Mebane, for and during her natural life; and after her death, to her children. One other fifth part to my executor, in trust for the sole and separate use of my daughter Virginia B. Swepson, during her life; and after her death, to her children, if she should have any; and on her failure to have children, then to my own children and grand-children; the said grand-children to represent in the division their deceased parents, and take only such share as they would have taken if living. One other fifth part to my daughter Ann Elizabeth, for her natural life only; and after her death, to her children, if she shall have any; and on failure of children, then to my own children and grand-children, as above directed. One other fifth part to the child of my deceased son, Algernon S. Yancy,

namely, Ann E. Yancy, for her natural life only; and after her death, then, to her children; and on failure to have children, then to my own children as above directed; and the remaining fifth part, I give to the children of my deceased daughter Frances McAden, namely, Bartlett Y. McAden, Rufus McAden, John Henry McAden and Frances Ann McAden, to be equally divided between them. My will is that, in the division of the residuum of my estate as above directed, the property specifically bequeathed herein shall all be valued and accounted for, except the negro slaves given to my two grand-daughters Betsy Ann Mebane and Frances Ann McAden; and when the division is made, my daughter Ann Elizabeth may exercise her own will, and take her share in property, or its value in money, as she may think best. * * * * *

"My will and desire is, that the valuation of the residue of my estate be made by five competent persons, to be chosen by my executor with the approval of my children; and that the valuation and division so made by my executor and the five persons aforesaid be returned to, and recorded in, Court. I direct that my executor shall at all times be subject to the control of my daughter Virginia, in regard to the property he may hold in trust for her; that her order to him for any share of it, at any time, shall be full and sufficient authority to him to dispose of it according to such order; and that her individual receipt be sufficient evidence for him as to any sum or sums he may pay to her, or dispose of for her benefit.

(A) "In the fourth clause of my will, I have bequeathed to Frances Ann McAden, the remainder in the slaves Oscar and Susan, after the death of my daughter Ann Elizabeth; now, my will is that, in the division of the residue of my estate, the value of their interests given in the slaves, as aforesaid, to the said Frances Ann, be ascertained by the five persons above specified, and that my said grand-daughter shall account for the same at the valuation aforesaid, as a part of her share of the residuum. During the life of Giles Mebane, the husband of my daughter Mary Catharine Mebane, I will and direct that

the property herein given and bequeathed to his wife, shall be held by him in trust to manage and improve the same for the sole and separate benefit of his wife and children, and in no event shall he have power or authority to dispose of the same without the consent of his wife, to be rendered in writing, and to be attested by at least one credible witness. I appoint my son-in-law, the said Giles Mebane, executor of this my last will and testament, hereby revoking all others, &c."

The bill is filed by the executor, stating that, in consequence of conflicting claims among the several legatees, he finds difficulties in the way of carrying the provisions of the above will into effect, and prays the advice and direction of the Court upon the following questions, viz:

One arises on the 2nd clause of the will. The legatee therein named, Frances Ann McAden, who was an infant about twelve years old, died after the execution of the will, but in the lifetime of the testator, and the question is, whether the limitation to her brothers Bartlett Y. McAden, John H. McAden and Rufus McAden, is effective to pass the interest in these six slaves to them, or does the legacy lapse and fall into the residuum of the estate?

Another question grows out of the 4th clause, viz., whether in making a valuation of the land, the life-estate of Ann E. (now Mrs. Womack) should only be estimated, or whether the value of the whole fee shall be charged against her in the division of the *residuum.*

The same question arises upon this clause, as to the slaves given to Mrs. Womack for life, and in the several other instances where life-estates only are given in slaves and other property.

The same question particularly arises in respect of Oscar and Susan, who are given by the 4th clause to Ann E. for her life only, with a contingency to her children, and on failure of children, then over to Frances A. McAden, and who are directed in the clause marked (A) to be valued against the said Frances Ann.

Another difficulty arises upon the distribution of the re-

siduum: whether the share of Frances Ann McAden lapsed by her death in the life-time of the testator, and therefore, to be deducted from the *fifth* going to the McAden children, or do they take a full fifth without such abatement?

The executor states that Ann E. Yancy, the only daughter of Algernon S. Yancy, is an infant, residing with her mother in the State of Tennessee, and the legatees having a contingent interest in the property, have given him notice not to deliver it to her guardian, to be taken beyond the limits of the State, and although he thinks it is a question with which he has nothing to do, yet, he says, he is unwilling to act in the matter, until the parties settle the question between them.

Ann E. Yancy, after the death of the testator, intermarried with Thomas Womack, and he, together with Virginia, (intermarried with George W. Swepson), Bartlett Y. McAden, Rufus McAden and John H. McAden, children of the deceased daughter, Frances McAden, Ann E. Yancy, only child of Algernon S. Yancy, and Mary Catharine Mebane, wife of the executor, are made defendants.

The several defendants (except Mrs. Mebane) answered the bill, admitting the facts alleged, and each contending for the construction favoring their interests in the questions above propounded to the Court.

The cause was set down for hearing on the bill, answers and exhibits, and sent to this Court for trial.

Norwood, for the executor.
Bailey, for the McAdens.
Morehead, for Swepson and wife.
Kerr, for Womack and wife.

Battle, J. The questions arising upon the construction of the will of Ann Yancy, will be considered by us in the order in which they are presented in the pleadings.

1. The first question arises upon the following clause, "I give and bequeath to my grand-daughter, Frances Ann McAden, the following slaves, to wit, Grandison, &c. These

slaves I bequeath to her for life, with remainder to her children, if she should ever have any, if not, then to her brothers, &c." The legatee having died in the life-time of her grandmother, it is clearly settled by the cases of *Simmons* v. *Gooding*, 5 Ire. Eq. 382, and *Roach* v. *Knight*, Busb. Rep. 103, that the remainder shall take effect in her brothers.

2. The second question is presented upon the fourth clause, which is as follows: "I give and bequeath to my daughter Ann Elizabeth Yancy, the tract of land on which I now reside, &c., to have the same during her life only; and after her death, I give it to her children, if she have any; and in default of children, then to my grand-daughter Frances Ann McAden. I direct that said land shall be received by my said daughter at valuation; the valuation to be ascertained by three competent persons to be chosen by my said daughter and my executor; but on estimating the value, my will is, that the buildings, viz., the dwelling-house and necessary out-houses shall not be included." The dispute between the parties, whether the valuation of the land, exclusive of the houses, shall be of the fee simple interest, or only of the devisee's life-estate, must unquestionably be decided in favor of the former. It is a fundamental rule in the construction of a will, that the intent of the testator, to be ascertained by an examination of all its parts, shall prevail, provided it is consistent with the established rules of the law. Here, it is manifest that the testatrix, in the distribution of her property among her living children and the children who had died, intended an equality, or an approximation to it, as between the different families. It is equally clear that she wished to provide for keeping the property in the families, as long as possible, by giving to the living legatees life-estates only, with remainders to their respective children, should they have any. This policy seems to have been departed from, only in the share of the residuum given to the McAden children. The property which is thus given by the testatrix to one of her children for life, with remainder to the children of such devisee or legatee, was designed as a full provision for the family of such devisee or

legatee, and consequently, the valuation to be put upon it for the purposes of the general division among all the families ought to be of the whole estate, that is, the fee simple interest in the land, and the absolute interest in the slaves.

3. The third question, which relates to the valuation of the slaves, was so intimately connected with the second, that we were obliged to consider them together, and the result is already announced.

4. The fourth question is presented by the following clauses: "I also give and bequeath to my said daughter (Ann Elizabeth) two negroes, namely, Oscar and Susan, to be taken by her at valuation, &c., to be held for and during her life only, with remainder to her children, if she should have any; and on failure of children, then to Frances Ann McAden, during her life; and upon her dying without children, then to her brothers and sisters." "In the fourth clause of my will I have bequeathed to Frances Ann McAden the remainder in the slaves Oscar and Susan, after the death of my daughter Ann E.; now, my will is, that, in the division of the residue of my estate, the value of the interest given in the slaves aforesaid, to the said Frances Ann, be ascertained by the forms above specified; and that my said grand-daughter shall account for the same at valuation aforesaid as part of her share of the residuum." The difficulty suggested in these clauses involves two subordinate questions. The first is, whether the latter clause takes away from the children of Ann Elizabeth, the contingent remainder given to them in the former; and we are of opinion that it does not; because the omission to name them is contained in a mere recital of the precedent gift for life to Ann E., and not intended to change the limitation to her children, engrafted upon it. The second question is, whether, as Frances Ann died in the life-time of the testatrix, her contingent interest in the said slaves will go to her brothers; and by reference to the cases cited in the answers to the first principle question, it will be seen that the remainder will be good, whether it be a vested or contingent one. These two subordinate questions being settled, we have no hesitation in saying,

that while the legatee Ann Elizabeth must account for the slaves in question at the value of the absolute interest in them, for the reasons already given, the McAden children can be charged in the general division of the residue with the value of their contingent interest only, just as it must have been charged against their sister had she lived. Their only interest in the said slaves is a contingent interest, and that is all which the will requires to be valued.

5. The fifth question relates to the residuary bequest which, after dividing the residue of the estate into five parts, and assigning a part to each of the three living daughters of the testatrix, and a part to her grand-daughter, Ann E. Yancy, concludes thus: "and the remaining fifth part I give to the children of my deceased daughter Frances McAden, namely, Bartlett Y. McAden, Rufus McAden, John H. McAden and Frances Ann McAden, to be equally divided between them." This question presents the enquiry, whether, if one of several legatees of a fund, being brothers and sisters, die in the life-time of the testatrix, his or her share will lapse and thereby fall into the residuum, or will survive to his or her brothers and sisters. For the latter construction it is contended that the brothers and sisters take as a class, as the children of a deceased parent, and that, therefore, if one die before the testatrix, the survivor will take as representing the class; and for this the counsel has referred to the case of *Simms* v. *Garrot*, 1 Dev. and Bat. Eq. 393. Had the will given the property to the children of Frances McAden, deceased, without naming them, then they could have taken as a class only, and the argument would have been unanswerable; but by naming them they became legatees individually, and the death of one in the life-time of the testatrix must be attended by the usual result of a lapse. Thus, in the case of *Knight* v. *Gould*, 2 Myl. and Keene's Rep. 295, it was said by the Lord Chancellor, "A bequest to children living at the testator's death, is, on all hands, admitted to be a bequest to the class, and it survives to those who shall answer the description by surviving the testator. Then, why not also a bequest to executors? But

it is said, the words 'hereinafter named' are added, and that these words added to a bequest to 'children' would make the description cease to be that of a class. Assuredly it would, because such words are used for the very purpose of specifying certain of the children, and therefore, they must expressly exclude the supposition of a class being intended, &c." The consequence is, that the brothers of Frances Ann McAden are entitled to only a fifth part of their deceased sister's share of the residue.

6. The sixth, and last question, is one which we cannot answer; because, upon the present bill, we are not at liberty to give any direction in relation to the slaves bequeathed to the testatrix's grand-daughter Ann E. Yancy. When her guardian shall attempt to remove her slaves beyond the limits of the State, the other legatees who have a contingent interest in such slaves, may proceed as they may be advised, to have such interest secured to them.

A decree may be drawn in accordance with this opinion, and the executor must pay all the costs out of the assets of the estate in his hands.

Per Curiam. Decree accordingly.

JOHN C. PETTIJOHN AND ANOTHER *against* HENRY WILLIAMS AND ANOTHER.

Where vendees of property filed a bill in Equity against the vendors, alleging a fraudulent misrepresentation, and great losses arising from defects in the property, and praying a rescission of the contract, the Court will not compel the plaintiff to choose between releasing a recovery at law for the fraud, obtained during the pendency of the bill, and dismissing the bill, (the sum recovered at law not having been accepted by the plaintiffs,) but will permit them to proceed with their suit in Equity, and in case of a recovery in that Court, to take the benefit of whichever recovery may appear the more adequate.

APPEAL from an interlocutory order of the Court of Equity of Martin County, Judge CALDWELL presiding.

In the year 1849, William Milson, and Henry Williams as the executor of Ezekiel S. Whitley, deceased, conveyed to the plaintiff John C. Pettijohn, a fishery and the appurtenances, to wit, a vessel, two flats, a number of fish barrels, a quantity of salt, salt barrels, some ropes, &c., at the price of $3,500, and took in payment therefor five bonds on one Clayton Moore, for $480 each, payable at different dates; two notes on Caleb Walker for about $250 each, bearing interest; a bond on Bryan Griffin and J. G. Griffin for $230 or thereabouts; a bond on Jonathan Capehart for $416,66, amounting in all, with interest, to about $3470, all of which were endorsed by the plaintiff Pettijohn. Afterwards, upon a settlement between Williams and Milson, of the co-partnership business, it was found that the firm was indebted to Henry Williams in a large amount, and these bonds and notes were transferred to him, and he from that time held them in his individual right. Williams endorsed the bond on Capehart to Cushing B. Hassell without consideration, to enable him to bring a suit in Martin county, where the latter lived; and accordingly suit was brought against the obligor and the endorser in the County Court of Martin County, and a judgment obtained at July Term, 1850, for principal and interest. Execution was taken out on the same, and was about to be collected off of the plaintiff Pettijohn. In July, 1851, the plaintiff John C. Pettijohn, filed an original bill in this case against Milson and Williams, alleging, among other things, that they had induced him, Pettijohn, to purchase the fishery and appurtenances by fraudulent and deceitful representations as to its qualities and capabilities. The bill sets forth minutely, and at great length, the particulars of the transaction, and the means used to defraud the plaintiff Pettijohn; the deficiencies of the property and the heavy losses sustained by him in consequence of this fraud. He alleges that in consequence of the obstructions in the sein-ground, he had been driven to heavy expense in endeavoring to get rid of them, and

that still the condition of the fishery is such as to make its continued operation ruinous. He, therefore, prays the Court to decree a rescission of the contract of purchase; a restoration of the notes and bonds given by Pettijohn for the property; and a refunding to him of the great sums paid in endeavoring to make the property useful; and he submits to re-convey the fishery and the appurtenances. He prays that the defendant Williams, may be enjoined from collecting the judgment obtained against him as endorser on the Capehart bond; and that he may be further enjoined from negotiating or collecting the other bonds; and for general relief.

The defendants answered, denying the allegations of the bill, and urging matters of law upon which they relied as a defense.

On the coming in of the answers, the injunction was dissolved as to the judgment at law, and execution ordered to issue against plaintiff and his sureties to the injunction bond; and that the injunction be continued as to the assignment or transfer of the other notes and bonds.

The bill was continued over as an original bill, and amended, by stating that Pettijohn had conveyed one half of his interest to Pender, and by making him (Pender) a party. In this amended bill, they both offer to re-convey the property, and pray a rescission of the contract. Subsequently, Pettijohn sold his whole interest to Pender, and a supplemental bill was filed stating that fact, and again offering on the part of Pender to re-convey upon a rescission of that contract.

These bills were also answered by the defendants, denying as before stated, and urging other reasons against plaintiffs' right to recover.

After the filing of the original bill, Pettijohn brought suit against Milson and Williams in the Superior Court of Law of Washington County, declaring in an action on the case for a fraud in the sale of this fishery. The suit being removed to Chowan for trial, at Fall Term, 1853, plaintiff recovered a verdict against Milson for $1,500, but a verdict of not guilty was rendered in favor of the other defendant, Williams.

The plaintiff appealed to the Supreme Court upon exceptions taken to the trial below, and that Court, being of opinion that there was error, ordered a *venire de novo* as to Williams. (Vide 1 Jones' Law Rep. 145). On a second trial, as to the defendant Williams, the jury found a verdict for $700, which he, Williams, paid into the clerk's office.

At the Spring Term, 1855, the following entry was made: "Defendants have leave to file their plea since the last continuance."

At the Fall Term, 1855, an affidavit of the above facts as to the suit at Law, was filed by defendant Williams, upon which was based a motion that the plaintiffs should be put to their election, whether they would receive the recovery at Law or proceed further with this suit.

In reply to this affidavit, plaintiff Pettijohn filed an affidavit, stating that Milson is utterly insolvent, and that there is no prospect of making any thing from the recovery in the Court of Law against him, and that plaintiff has not yet taken any part of the recovery against Williams.

Whereupon, the following order was made by his Honor in the Court below: "On motion of defendants' counsel, it is ordered that the plaintiff elect to take the judgment at law recovered by the said Pettijohn, and to dismiss the present bill, or to release the said judgment."

From this order the plaintiffs prayed an appeal to the Supreme Court, which was allowed.

Rodman, for plaintiffs.
Smith, for defendants.

Pearson, J. Supposing the doctrine of election to be applicable to a case like the present, there is error in the decretal order appealed from, in this, that it puts the plaintiff to an election either to dismiss his bill, or to *release* the judgment which he had obtained at law. There is no precedent for such an order. Where the chancellor is informed that a plaintiff in Equity is at the *same time* prosecuting a suit at law

against *the same defendant, for the same thing*, he will, after answer filed, and time for filing exceptions past, order the bill to be dismissed, unless the plaintiff will submit to an *injunction* against taking any further proceedings in the suit at Law pending the proceedings in Equity; thus leaving the way open for the plaintiff, if he fail in obtaining relief in Equity, to fall back upon his remedy at Law, if he have any. If the plaintiff elect to proceed at Law, his bill is dismissed without prejudice, so that if he fail at Law he may fall back upon his remedy in Equity, and file a new bill. 2 Madd. Ch. 358, '9; Daniel's Chancery Practice, and the cases cited. The idea that a plaintiff must release, forego, and forfeit his judgment at Law, as a condition precedent, without which a Court of Equity will not entertain his bill, is not intimated in any of the books. The decretal order must be reversed.

By way of a *protestando*, which, as Lord Coke says, is the "exclusion of a conclusion;" in other words, to prevent misapprehension, and without intending to express an opinion on either side, but merely to suggest ideas for the consideration of the counsel, we think proper to add, it would seem upon the authorities, that this doctrine of election, according to which a Court of Equity will refuse, after answer filed, to entertain a bill, unless the plaintiff submit to an injunction as to further proceedings in his action at Law, applies only to cases where the plaintiff seeks to recover from the defendant the *same thing* that he is seeking to recover in an action at Law, which is then pending; as, when an action of account is pending, and the plaintiff files a bill for an account. It is put upon this reason: as the parties are the same and the relief is the same, the second suit is merely for vexation, and consequently will not be entertained by a Court of Equity, unless upon condition that all further proceedings in the first, are in the mean time to be suspended. See Madd. Ch. and Daniel's Ch. Prac. and the authorities cited. It would therefore seem to follow, that if the remedy in Equity is different, being more adequate, and better adapted to meet the justice of the case

than the remedy at Law, there is no reason why the plaintiff may not, in conscience, resort to all the means of redress for the injury which has been done to him, which the Courts of the country will give; and after ascertaining the extent of the relief which will be granted to him in the several Courts, then to make his election, and enforce, by execution, the judgment or decree of that Court which he may be advised metes out to him the fullest measure of justice.

It is settled, that, upon a bill for the specific performance of a contract to convey land, the fact that the plaintiff has already recovered judgment for damages for a breach of contract, does not present a case for election; indeed, according to the old practice, the bill would not be entertained, unless the plaintiff had first established his right by an action at Law. 1 Madd. Ch. 262 and the cases cited. So, by way of analogy, if there be several tort-feasors, the party injured may sue one alone, get judgment, let it stand, then sue another, take judgment, &c., and finally make his election, out of which he will take satisfaction. This is familiar *nisi prius* learning; see also *Casey* v. *Harrison*, 2 Dev. Rep. 244, where this subject is treated of *arguendo*.

There is still another consideration. After the plaintiff has obtained judgment at Law, *cui bono* should a Court of Equity enjoin him from further proceedings, as a condition to entertaining his bill? The very fact of his receiving satisfaction of the judgment at Law, extinguishes his cause of action in Equity, and will put him out of Court, so as to defeat his purpose of ascertaining in which Court he can have the fullest measure of justice.

On the other hand, we think it proper also to suggest for the consideration of counsel, that it may be doubted whether the plaintiff is not too late in making his application to this Court. He has used the fishing ground for two years; he has assigned his interest to the other plaintiff, Pender; many of the articles included in the contract of sale were perishable, and cannot be returned; the changes and alterations in the fishing hole and beach may not permit the parties to be put

in statu quo; and he has tested the qualities and capabilities of the fishing ground. See *McDowell* v. *Simms.* Busb. Eq. 130.

Per Curiam. Decretal order reversed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1856.

BENJAMIN SELF *against* JOHN L. CLARK AND OTHERS.

An agreement between A and B, that the former, the father of a girl who had been debauched and got with child by B, would take the child and its mother and support them for three years; that he would, further, discourage his daughter from swearing the child, and would give up his action of damages, in consideration that B would convey him a tract of land, is not immoral and against the public policy.

APPEAL from an interlocutory order of the Court of Equity of Guilford County, his Honor, Judge DICK, presiding.

The statement in the bill is, that the defendant Clark, who is a married man, debauched the daughter of the plaintiff, and that she became pregnant by him; that to save the feelings of his own family, and to conceal the dishonor brought upon the plaintiff by his act, also in lieu of any claim for damages for the seduction, he agreed with plaintiff that he would convey to him a certain tract of land, described by metes and bounds, on which the plaintiff was then residing, and in consideration thereof plaintiff was to give up all cause of action for the seduction of his daughter; that after the child

should be born, plaintiff was to take care of his daughter and her child, and was to discourage her from swearing it to the defendant Clark; but if a warrant were taken out by other persons to compel her to swear it, Clark was to furnish her with money to pay the fine. Accordingly a deed of conveyance was made of the land in question, conveying the same to the plaintiff in fee simple, and delivered, as an *escrow* to the defendant Ragsdale, to be delivered to the plaintiff at the end of three years from the birth of his daughter's child, provided plaintiff's daughter did not swear the child to the defendant Clark, within that time. This obligation, on his own part, was also reduced to writing, and put into the hands of the defendant Ragsdale. The bill states that he has continued in possession of the land, and has complied with his part of the agreement faithfully, by taking care of his daughter and child from the time the child was born until a short time before the three years expired, when the defendant Clark, having great influence with his daughter, prevailed on her to leave his house and reside in a house belonging to him near a saw-mill which he owned, leaving the child with plaintiff; that he managed to excite his daughter against him, and only a few days before the expiration of the time agreed on, procured her to swear the child to him, Clark. This, he charges, was done fraudulently and collusively, in order to defeat the condition on which the deed was to be delivered. Although often requested by plaintiff, the defendant Ragsdale, has declined to deliver the deed deposited with him, alleging as a reason for thus declining, that he has been forbidden by the defendant Clark, to do so, who pretends that the condition on which the delivery was to be made, has been broken, and that he is not bound to complete the conveyance. The bill further alleges that Clark has brought an ejectment in the County Court of Guilford, and recovered against plaintiff, and threatens to take out execution on the same, and turn him out of possession. The bill prays an injunction, also, for a conveyance of the land; and for that purpose, that defendant

Ragsdale be compelled to file the deed in his hands in the office of the clerk and master of Guilford County, that the same may be delivered over to the plaintiff; also for general relief.

At the return Term, the defendant Clark, demurred to the bill, for the reason that the consideration for making the deed in question was "immoral, illegal and impolitic." There was a joinder in demurrer, and the cause was set down for argument.

On hearing the argument of counsel, the Judge below overruled the demurrer, and ordered the defendant Clark to answer; also, that the injunction theretofore issued be continued. From which decree the defendant appealed.

Morehead, for plaintiff.
Miller, for defendants.

Pearson, J. A father, whose daughter is debauched, has a cause of action for damages. The daughter is not obliged to swear the child, provided she pays a fine of five dollars, and gives bond for the maintenance of the child.

If the father, in consideration of a tract of land, releases his cause of action, and agrees to support the child, so that it shall not become a County charge, we can see nothing iniquitous in the transaction, and nothing which violates public policy, especially when, as in this case, the land stands as a security for the performance of the agreement; the object of the bastardy law being fully answered, and litigation prevented.

The doctrine in regard to marriage-brokage bonds, and agreement, in restraint of public trade, has no application. A bond given for future cohabitation is void; but a bond given as compensation, or rather in atonement for past cohabitation, will be enforced.

In our case there is no suggestion that there was a stipulation for the connivance of the father at future cohabitation, as a part of the price of the land; that would be, indeed, iniqui-

tous. After the injury was inflicted, the defendant ought to have offered compensation. There is nothing, even in good morals, which forbade the father from accepting it.

The law in regard to "compounding felonies" has no application. One who has been injured by a violent battery may accept compensation, and agree not to be active in getting up an indictment. Indeed, it is a common practice on the circuit, upon convictions for assaults and batteries, and the like offences, for the Court to intimate to the defendant that his case will be looked upon more favorably, if he will make ample compensation to the individual immediately injured. This is a commendable practice, for the ends of justice are answered by punishing the offender, while, at the same time, the individual peculiarly interested, receives compensation, and thus litigation is prevented.

PER CURIAM. The demurrer must be overruled

THOMAS G. DREW, ADMINISTRATOR, AND OTHERS *against* TIMOTHY CLEMMONS.

A bill, by several tenants in common of slaves, praying for a sale for partition, and also, praying for an account for hires against one not alleged to be one of themselves, is multifarious, and cannot be sustained.

A bill, by tenants in common of slaves, for a partition, cannot be sustained, while another is in the adverse possession of such slaves.

CAUSE removed from the Court of Equity of Brunswick County.

In contemplation of a marriage about to be solemnised between the defendant, Timothy Clemmons, and Unity Gilbert, on the 8th day of January, 1831, the former entered into a contract in writing under seal, whereby, certain slaves therein mentioned, to wit: Liddy, Dora, Mall, Hardy and Jane, with the increase of the females, are secured to the said Unity, "during her natural life, and after her death, one-half of the

above described negroes, with their future issue and increase of the females, to be equally divided to the child of the said Timothy, if any by the said Unity, and if more than one child by the said Unity, then, and in that case, the whole of the said negro slaves, with their future issue and increase, to be equally divided among the children that the said Timothy may have by the said Unity Gilbert; and in case the said Unity should have no child by the said Timothy, after her death, the above described negro slaves, with their future issue and increase, to revert to my other children, and their heirs and assigns."

Unity, who, immediately after the execution of the above instrument, became the wife of the said Timothy, died in the year 1852, without ever having had any child or children by the said Timothy; leaving the defendant, Timothy, surviving her.

The plaintiffs are the children of the defendant, Timothy, by a former marriage, and the personal representatives and descendants of such as are dead.

The bill prays for a partition of the slaves, and for an account of the hires since the death of Unity, alleging that the defendant has been, since that time, in possession of them, and has made large profits from them.

The answer, not being adverted to in the opinion of the Court, is not set out.

The cause was set down for hearing on the bill, answer and exhibits, and sent up by consent of parties.

London, for the plaintiffs.

No counsel appeared for the defendant in this Court.

Nash, C. J. The bill is filed for the partition of certain slaves. It alleges that the plaintiffs are tenants in common of the slaves mentioned, by virtue of a marriage settlement made between the defendant, Timothy Clemmons, and one Unity Gilbert, whereby the slaves were conveyed to the said Unity during her life, and after her death, to the children of

the said Timothy; that she is dead, and the complainants are the children of the said Timothy and their descendants, and entitled, by the marriage settlement, to the slaves, as tenants in common. The bill then states that the defendant, Timothy Clemmons, the grantor in the deed, and the husband of the said Unity, and who has survived her, is in possession of the said slaves, and has been since the death of his said wife, hiring them out and making large profits, of which they claim their respective shares. It prays for an account of the hire of the slaves, and a sale of them for partition.

The bill cannot be sustained. It is multifarious, bringing before the Court distinct and independent causes of action, to wit: praying an account and relief against Timothy Clemmons, and a sale of the slaves for partition among the claimants. Adams' Eq. 568; 4 John. Ch. Rep., 199.

2. The bill is demurrable, as it states that the defendant, Timothy Clemmons, is in the adverse possession of the slaves, using them as his own. The bill does not use the word *adverse*, but the statement shows such to be the character of the defendant's possession. The principle is too plain to need authority, that tenants in common cannot procure a partition or sale of property, while out of possession. They must obtain possession before they can sustain a bill for partition.

PER CURIAM. Bill dismissed.

TIMOTHY CLEMMONS *against* THOMAS G. DREW AND OTHERS.

When there has been a palpable mistake by a draftsman, in drawing a marriage settlement, the Court of Equity will reform it, so as to make it express the intention of the parties.

CAUSE removed from the Court of Equity of Brunswick.

In the year 1831, the plaintiff, Timothy Clemmons, who was a widower, with several children by a former marriage,

and who was possessed of several slaves, and other property of value, married Unity Gilbert, who was a widow with a small property in slaves, &c., and who also had several children by her former marriage. Previously to the consummation of this marriage, a deed was entered into by the parties, and a third person, one Goodwin, as trustee, the purpose and effect of which was to secure the use of her property to the said Timothy Clemmons and Unity Gilbert, his intended wife, during their joint lives, and after the death of either, then to the survivor, and after the death of both, then to the children of the said Unity by her former husband; but if there should be a child or children by the then contemplated marriage, he or they were to come in for "an equal share of the stock." The marriage took place, and the parties lived together for twenty-one years, when the said Unity died, without having had any child or children by this marriage.

The bill alleges that it was the understanding and agreement between the plaintiff and his intended wife, Unity, that a similar deed should be drawn at the same time, and be executed by him, so as to secure the property which he owned, to himself and the said Unity for their joint lives, then to the survivor for her or his life; and in case there should be no issue of the marriage, the property of each was to go to the children of their former marriages respectively. It further alleges that one Moses McKeithan was employed by him to write the deeds, and instructed accordingly; but, that in drawing the latter deed he has omitted to give him any estate in these slaves after the death of his wife, but gives them all to his children after that event. The bill alleges that, according to the deed as it now stands, the children of his former marriage are immediately entitled to the slaves, and that they, so believing, have filed a bill in the Court of Equity of Brunswick, seeking to take these slaves from him and sell them for a division, and make him account for their hires since the death of Unity, his late wife. The bill prays that the deed in question may be reformed in this honorable Court, so as to make it express the intention of the parties.

The children by his former marriage are made parties, and they answer that they have never been informed, and do not believe the instrument in question was intended to be different from what it is, and so they hold the plaintiff to strict proof.

The deposition of Moses McKeithan establishes the allegations in the bill; its contents are recited in the opinion of the Court so fully that it is not deemed necessary in this connection to state them.

The cause was set for hearing on the bill, answer, exhibits and proofs, and sent to this Court by consent.

No counsel appeared in this Court for plaintiff.
London, for defendant.

Nash, C. J. The bill states, that a marriage being about to take place between the plaintiff and one Unity Gilbert, it was mutually agreed that "each party should place their property in such a condition as that they should have a joint estate in the property of each during their lives, remainder to the survivor for life, and after the death of both, if without issue from the intended marriage, then, and in that case, the property should go to the children of each by their former marriages; her children having her property, and his children taking his property." That Moses McKeithan was called upon to draw two deeds, and the intention of the parties fully explained to him. In drawing the deed from Unity Gilbert, the intention of the parties was observed, but in drawing that to be executed by the plaintiff, the draftsman committed a great error; for, by that deed, the whole of the negroes of the plaintiff were conveyed to Unity Gilbert during her life, and upon her death without issue of the marriage with the plaintiff, then to the children of the plaintiff by his former wife, who are the present defendants. The defendants deny that there was any mistake in drawing the deed executed by the plaintiff.

The bill is to rectify this alleged mistake. The testimony of Mr. McKeithan conclusively establishes the mistake. He

states that the intention of the parties was, that they should jointly own and enjoy the whole of the property, as well that of Unity Gilbert as of the plaintiff, during their joint lives, with remainder to the survivor during his or her life, and upon the death of both, without leaving issue of the marriage, the property of each should return to his or her children by their respective previous marriages; that his instructions were to draw the deeds in conformity with that agreement.

Both the deeds are before the Court as exhibits. In the one disposing of the property of Unity Gilbert the intention of the parties is fully expressed; but in that executed by the plaintiff, there is a most important variation. Under it, he has no interest in the slaves beyond the life of Unity, but upon her death, without issue of the marriage, the slaves of the plaintiff are to go immediately to his children. McKeithan tells us that the deed of Unity expresses truly the agreement, but that of the plaintiff does not. He accounts for the discrepancy between the two deeds with a *naivete* both amusing and creditable to him. Unity's deed was drawn first, a work of some labor; and when he had got through the first part of the plaintiff's deed, the latter invited him to go and take a drink: the invitation was not to be neglected, but he is silent as to the number of drinks he did take. He returned to his work, and slyly insinuates that the latter part was written under the pressure of the plaintiff's impatience to get married, and of his to get home. Unity's deed was read over to her before executing it; the plaintiff's was not; upon the assurance of the witness of its being like the other, and that plaintiff executed it in ignorance of the mistake, of which he, the witness, was, at the time, perfectly unconscious.

The statement is so plain and simple as to carry conviction with it; but if any doubt could remain as to its truthfulness, it must all vanish upon considering the transaction. The object of the parties was that the property of each, after the death of both, should go to the children of their previous marriages, should there be no issue of that about to take place: thus securing to each a life-estate in all the slaves. The deed

of the plaintiff, so far from carrying out the agreement, strips him of his property upon the death of Unity, and leaves him without any support, dependent upon the charity of his children. How far he could depend upon that tie, which binds the child to the parent—perhaps the most universal tie known to our nature—is evidenced by the bill filed by his children, to strip him of his property, and which is disposed of at the present term of the Court. Besides, how is it possible to suppose that the plaintiff should be willing that Unity, if she should survive him, should have all the slaves during her life, and if he survived her, she dying without issue of the marriage, all of his slaves should go immediately to his children, and leave him penniless?

The mistake is fully proved, and the plaintiff, Timothy Clemmons, is entitled to have the deed executed by him, corrected, so as to conform to the agreement made between him and Unity Gilbert, before the marriage.

PER CURIAM. Decree accordingly.

ROBERT E. TROY *against* THOMAS A. NORMENT.

Where irreparable injury is alleged by the plaintiff, and is made apparent by the allegations in his bill, the Court will not dissolve a special injunction, simply on the denial in the defendant's answer.

APPEAL from an interlocutory decree, made by his Honor, Judge CALDWELL, at the Spring Term, 1856, of the Court of Equity of Robeson County.

The plaintiff owns a small tract of land, of about eleven acres, adjoining the town of Lumberton, on which he resides, through which there flowed a sluggish expanse of water, creating much swamp-land and marsh; but by cutting ditches in several directions, he had caused the water to flow off freely, and had, in a great measure, reclaimed this marsh, so as to make it fit for cultivation.

The defendant owned a larger tract of land, adjoining the plaintiff's, lying partly on the marsh or swamp above mentioned, and partly on a depression or swamp, beyond a ridge that entirely separated the natural flows of water into these two depressions or swamps. On this latter side of the ridge there were several ponds of stagnant water, besides the water oozing through the swamp.

The plaintiff alleges in his bill that the defendant commenced the process of draining that portion of his lands lying on the opposite side of the ridge from him, and was, as plaintiff supposed, about to conduct the water from the ponds and swamp, through ditches leading along the natural course of the water; but for some unexplained cause, he suddenly turned towards the plaintiff's land with his main ditch, and was, at the time of filing the bill, in the act of cutting through the ridge above spoken of, and threatened by this means, to throw the whole accumulation of water from these ponds and ditches, mentioned above, into the swamp or depression above described as being on the plaintiff's land, so as to make the whole pass through the ditches prepared by plaintiff; which he alleges, are sufficient to conduct off all the water that might collect in the depression above him, on his side of the ridge, but are by no means sufficient to discharge the additional amount about to be thrown upon his land by this proposed ditch. He alleges that the consequences will be, that his land will be again overflowed, and large quantities of earth, sand and gravel, will be washed down upon it, and entirely frustrate all the pains which he has taken to improve and reclaim it, and will make this part of his tenement worthless, or nearly so. He avers that this grievance would be of constant recurrence, and such that no compensation in damages could adequately remunerate. He further avers that there is no necessity for this act of the defendant, for that he had it in his power, by pursuing the mode prescribed by Act of Assembly, to conduct all the water from these ponds and the swamp, by pursuing with his ditch the natural flow of the water as it now runs, without deviating to cut across the ridge.

The prayer of the bill is for an injunction to restrain the defendant from proceeding with the ditches, as threatened by him, and for general relief.

The defendant's answer denies that he intends to throw all the water on the further side of the ridge, upon the plaintiff's side; but he says there is one pond on that side which is extremely injurious to his land, and by cutting this ditch, "which is its natural outlet," he can get rid of it quite conveniently, and thereby keep entirely on his own land; and that otherwise he should have to go upon the land of his neighbor below to make a drain, and should then have to pay damages; besides, in this latter course, he should have to cross the public road with his ditch, which would be a great public inconvenience. He denies that the water which he proposes to pass through the improvement complained of, will cause any accumulation of earth, sand or gravel, as apprehended by the plaintiff, or any accumulation of water, so as to prejudice or incommode the land of the plaintiff; for he says, the fall is such that the whole will pass off freely from plaintiff's land.

On a motion to dissolve the injunction previously granted, the Court, being of opinion with the plaintiff, refused so to order, and the defendant, by leave of the Court, appealed.

Leitch, for plaintiff.
Shepherd, for defendant.

Nash, C. J. The doctrine of injunctions, as a branch of Equity jurisdiction, has been so often before this Court, and the difference between a common and a special injunction, so plainly pointed out, that it cannot be necessary to discuss the matter here.

The plaintiff is the owner of a small tract of land, containing eleven acres, which lies below, and contiguous to, a large tract belonging to the defendant. The plaintiff has cut ditches to drain his land, which are sufficient for that purpose. Upon the defendant's land there are several

large ponds and bays, and to drain them he is cutting ditches, which will throw the water which runs upon the defendant's land upon the plaintiff's; fill up his ditches and overflow his land. The bill alleges that in cutting his ditches the defendant has left the natural course in which the water flows, and is carrying it through a ridge which divides their respective lands; and that, by pursuing the course of the drainage, the defendant can effect his purpose without injury to the plaintiff. The answer denies that, in cutting his ditches, the defendant has deviated from the natural course of the drainage, and avers that his ditches are needed for the draining of his land; but he admits substantially that the same object may be obtained by him by pursuing a different course.

The principle governing such an application as this is fully stated in the cases of *McBrayer* v. *Hardin*, 7 Ire. Eq. 1, and *Purnell* v. *Daniel*, 8 Ire. Eq. 9. In applications for special injunctions, (and this is such a one,) the bill is read as an affidavit to contradict the answer; and where they are in conflict, and the injury to the plaintiff will be irreparable, if the relief be not granted, the injunction will not be dissolved on motion, but will be continued to the hearing, to enable the parties to support by proofs their respective allegations. Justice demands this course. When there is nothing before the Court but oath against oath, how can the Chancellor's conscience be satisfactorily enlightened? It is not denied that every owner of land has a right to improve it in any way he pleases; to cut ditches to drain it where necessay; but in exercising his own just rights, he must be careful to inflict no injury on his neighbor. The defendant, therefore, has a clear right to ditch his own land, but the plaintiff has an equally clear right to be protected in the enjoyment of his property, and when the injury will prove irreparable he has the right to invoke the aid of this Court. The bill alleges that the ditches of the defendant deviate from the natural course of the run of the water; this, the answer denies. The Court cannot know how the fact is without proof.

By the interlocutory order of the Court below, the injunction

was continued to the hearing. In this there is no error. This opinion will be certified.

PER CURIAM. Decree accordingly.

ERASMUS H. SAUNDERSON *against* CALEB BALLANCE.

Where A, having an unregistered deed for half of a tract of land, stands by and sees the same sold at public auction by a trustee as the land of another, and permits B to buy it, and afterwards to pay the purchase money and take a deed for it from the trustee, under an impression that he was getting a good title for the whole; which impression is well known to A, and he does not disclose his title at such auction sale, nor say anything about it at that time, nor afterwards, before the money is paid; such concealment is a fraud upon B, and a Court of Equity will compel A to convey his moiety to B, upon the repayment of what he gave for such moiety.

CAUSE removed from the Court of Equity of Hyde County.

Thomas Ballance, now deceased, being greatly indebted to various persons, for the purpose of securing his creditors, made a deed in fee of his land in trust, to David Carter, dated 10th of May, 1853. Amongst other tracts of land he conveyed the one in question, lying near the town of Middleton, in Hyde County, known as the home plantation, containing about three hundred acres. This deed in trust was duly proved and registered, and by virtue of the power and authority therein contained, the said David Carter, as trustee, on the 15th of June, 1853, having made advertisement, exposed the lands embraced therein to public sale, to the highest bidder, on a credit of six months. The land in question was sold to the plaintiff, Saunderson, who became the last and highest bidder for the same, at $3,942, and gave bond and security for the purchase-money, according to the terms of the sale. At the maturity of the bond thus given, the plaintiff paid the purchase-money and took from the trustee a deed in fee simple for the same, without warranty; he, the trustee, believing that the title of the land was undoubtedly good.

Thomas Ballance had purchased the land in question from his father, one Caleb Ballance, and took a deed for the same, dated in the year 1821, which, for the want of words of inheritance, conveyed to the said Thomas only the life-estate of the grantor, Caleb. Thomas Ballance, however, immediately entered upon the land thus conveyed, and continued in the possession thereof up to the time of making the deed of trust above mentioned, claiming the same as his absolute property in fee.

Upon the death of Caleb, the grantor, the reversion of this land descended to his heirs-at-law, who were Thomas Ballance, Joshua Ballance, and a sister, who dying without issue, the whole reversion finally became the property of the said Thomas and Joshua.

On the 8th day of June, in the year 1853, a few days before the sale by the trustee, Joshua Ballance made a deed in fee for his half of the reversion of the land in controversy, to the defendant, Caleb Ballance, Jr., for the consideration of $25, which, it is admitted, was much less than the actual value thereof. Thomas Ballance, by permission of the plaintiff, remained in possession of the land, after the trustee's sale, until his death, which occurred in December following; and the defendant, who was living with the said Thomas, took the possession and still holds the same. When the plaintiff, in the month of January following, demanded the possession, from Caleb, he, for the first time, produced his deed from Joshua Ballance, and claimed one half of the land. This latter deed was not registered until after the death of Thomas Ballance.

The plaintiff alleges in his bill, that at the sale of the trustee above mentioned, while the land in question was being offered for sale, he enquired of the former owner, Thomas Ballance, in the presence and hearing of the defendant, Caleb, whether the title of the same was clear and indefeasible, and received for an answer, that it was; that the said Caleb made no claim to the land on this occasion, and said nothing about the deed which he now sets up; that he relied upon this assurance of the said Thomas, and

fully believed that he was purchasing the entire estate in the land; and that although the defendant knew well that he was buying under this impression, he failed to make known his claim of title to the half, as now set up, until after the plaintiff had paid the purchase-money and taken his deed as aforesaid. The prayer of the bill is for a conveyance of the half of the land bought of Joshua Ballance, and for general relief.

The defendant, in his answer, admits that he was present when plaintiff bought the land, and admits that he gave him no notice of the deed which he held from Joshua Ballance, for one half of it, nor of any claim to it whatever, and excuses himself for this omission by the following statement: "This defendant says, that he had said deed at, and before, the sale by Carter, the trustee, but he did not feel bound at said sale to disclose his title; because he knew, that before the sale, the deed from Caleb Ballance, Sen'r., to Thomas Ballance, had been examined by the trustee; and the said trustee knew, or might have known, that the said deed conveyed only a life-estate; and because said trustee in offering said land for sale, carefully and distinctly stated that it was only the estate of Thomas Ballance, whatever that might be, which was sold; which this defendant thought was a sufficient caution to all purchasers to inquire for themselves. This defendant thinks it probable the plaintiff did not know the character of the deed from Caleb Ballance, Sen'r., to Thomas Ballance; but he might easily have known the same, as the said deed was duly registered in Hyde County, on the 11th day of January, 1821, and the sale by the said Carter had been advertised for several weeks before it took place." The defendant denies that he heard the conversation, at the sale, between the plaintiff and Thomas Ballance, as stated in the bill.

There were replication and commissions; and testimony was taken; and the cause was set down for hearing on the bill, answer, exhibits, former orders and proofs, and sent to this Court.

Shaw, for plaintiff.

Rodman and *Donnell*, for defendant.

Battle, J. The allegation of the bill, that, at the time when the plaintiff purchased the land in question, and just before he made the purchase, he enquired of the former owner, Thomas Ballance, in the presence and hearing of the defendant, whether the title was good, and received an answer that it was, (the defendant not disclosing his title,) whereby the plaintiff was induced to purchase the land at a full and fair price, is rendered probable by the testimony taken in the cause; but the proof is not so full and satisfactory as to justify us in declaring the fact to be established. We might, therefore, in this state of the case, either direct a further inquiry to be made by the master, or order an issue to be tried by a jury, were we not satisfied that enough appears upon the pleadings to entitle the plaintiff to the relief which he seeks.

The defendant, in his answer, admits that, having ascertained that the deed under which his father claimed the land, conveyed only an estate for life, and that his father owned one half only of the reversionary interest in fee, he purchased the other half from his uncle, Joshua Ballance, to whom it belonged; that this purchase was made a short time before the sale made by Carter, the trustee; that he was present at the sale and did not disclose his title, alleging as a reason for his silence that "he knew that, before the sale, the deed from Caleb Ballance, Sen'r., to Thomas Ballance, had been examined by the trustee; and the said trustee knew, or might have known, that said deed conveyed only a life-estate; and because said trustee, in offering said land for sale, carefully and distinctly stated that it was only the estate of Thomas Ballance whatever that might be, which was offered for sale; which the defendant thought was a sufficient caution for all purchasers to enquire for themselves." He stated, as a further reason that, though he thought it probable that the plaintiff "did not know the character of the deed from Caleb Ballance, Sen'r., to Thomas Ballance, he might easily have known the same, as the said deed was duly registered in Hyde County, on the 11th day of January, 1821, and the sale by said Carter had been advertised for several weeks before it took place."

The statement that Carter had examined the deed under which his grantor, Thomas Ballance, claimed, was expressly denied by him in his deposition taken for the defendant. On the contrary, he declared that he thought the title of his grantor was "undoubtedly good." The testimony of other witnesses shows clearly that inquiries were made of Thomas Ballance, at the sale, whether his title to the land in question was good, and he answered, unhesitatingly, that it was. There can be no doubt, then, that the trustee thought he was selling an undisputed fee simple title, in the whole tract of land, and the bidders were laboring under the same impression. Can the plaintiff, who purchased under these circumstances, have, in this Court, the relief which he seeks?" This question we will now proceed to answer. Mr. Justice STORY, in his "Commentaries on Equity Jurisprudence," vol. 1, sec. 385, says: "In many instances, a man may innocently be silent; for, as has been often observed, *aliud est tacere, aliud celare.* But, in other cases, a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that his title is good, the former, so standing by, and being silent, will be bound by the sale; and neither he nor his privies will be at liberty to dispute the validity of the purchase." Among the cases upon which this doctrine was established is an early one,—*Raw* and *Pole* v. *Pole*, decided in 1691, reported shortly after, in 2 Vern. Rep. 239. "Leonard Pole, the defendant's elder brother, upon his marriage with the plaintiff Elizabeth Pole, settled the lands in question upon her for her jointure. The defendant was privy to the treaty of the marriage, and engrossed the jointure-deed, and concealed the entail. Leonard Pole being dead, without issue, and having devised the land to the plaintiff Raw, the defendant, having the deed of entail in his custody, made by his grand-father,

brought his ejectment and recovered. The plaintiffs brought their bill for relief, and the defendant, by answer, confessed he was privy to the marriage treaty, and engrossed the plaintiff Elizabeth's jointure-deed, and that he had then the deed of entail in his hands; but did not mention his title, nor discover the ancient deed of entail, because he apprehended his brother would dock the entail." The Court gave the plaintiff Elizabeth relief, and, as to her, enjoined the ejectment, but refused relief to the plaintiff Raw, because he was a mere volunteer. This case must be regarded as a strong one. It does not appear that the defendant procured, or had any agency, in bringing about the marriage between his brother and the plaintiff Elizabeth. He was only privy to it, that is, knew of it and assisted in preparing the jointure deed. His title was a remote one, depending upon the death of his brother without issue, and without having barred the estate tail; and he concealed the deed of entail, not with a view to defraud his brother's wife, but to prevent his docking the entail. But, notwithstanding all these circumstances, the Court thought that a high moral principle of honesty and fair dealing required it to interpose for the purpose of preventing the defendant from taking advantage of the probable effect of his silence. On the section next succeeding to that which we have already cited, Mr. Justice STORY says that, "in order, however, to justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprised of them, and should, by his conduct, or gross negligence, encourage or influence the purchaser; for, if he is wholly ignorant of his rights, or the purchaser knows them, or if his acts, or silence, or negligence, do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part." Under these exceptions to the general rule, the case of *Tilghman* v. *West*, 8 Ire. Eq. Rep. 183, was decided in favor of the defendant; but it is too obvious to require comment that they do not apply to the present case. The defendant knew his rights and intentionally

concealed them, and the plaintiff was, no doubt, influenced thereby to make the purchase. The plaintiff is, therefore, clearly entitled to the aid of this Court, in making his title good. But in order to have it, he must pay to the defendant the $25 which he paid to Joshua Ballance, with interest. He may have a decree that, upon doing this, the defendant shall surrender to him the possession of the land in dispute, and execute a deed for all the right, title and interest therein, which he acquired by his purchase from Joshua Ballance.

PER CURIAM. Decree accordingly.

THOMAS HOWERTON *vs.* JOHN WIMBISH, ADM'R.

The wife of one claiming a part of a fund raised by a sale of land, under a decree of a Court of Equity, of which land, it is alleged, she is a tenant in common, is a necessary party.

Where land has been sold under a decree of a Court of Equity, and on a petition by one of the parties, the fund has been ordered to be paid to him, it is not competent for one who was a party to the original petition, and who acted as a commissioner to make the sale, to file a bill *in the nature of a petition*, in the Court of Equity of another County, praying that a part of the fund may be paid to him, on the ground that he had no notice of the interlocutory petition.

CAUSE removed from the Court of Equity of Orange County.

The bill, which professes to be in the nature of a petition, alleges that James Vaughan died in the County of Granville, in the year 1816, having made and published his last will and testament, which was duly proved in the County Court of that County, and that he therein bequeathed and devised as follows:

"I lend to my beloved wife, Ann Vaughan, my whole estate, real and personal, in manner and form as hereafter to be stated and directed, with some exceptions hereinafter to be

made, during widow-hood. Item. I give and bequeath to my beloved wife, Ann Vaughan, one third of my estate, real and personal, my carriage and two best horses, four beds and furniture, all the curtains and toilets of every description, to her and her heirs forever. Item. In case it should be more convenient to my beloved wife to have the Nutbush land and my manor-house and land, and even the negroes, sold, (the latter, however, I suppose she ought to keep, as she will have two-thirds during widow-hood, and one-third in fee,) she is at liberty to do so, as she will have ample money to purchase elsewhere."

That Mrs. Vaughan was seized and possessed of the property thus devised and bequeathed, from the death of her husband till her own death, which occurred in January, 1833. That before her death, she made and published her will, which bears date 14th of September, 1832, with a codicil which bears date 9th of December, 1832, which was also proved in the County Court of Granville, and recorded; in which last mentioned will she devised and bequeathed to her granddaughter, Maria Howerton, her heirs and assigns forever, the Nutbush tract of land and plantation, also the house and lot in the town of Williamsborough, where she resided. That at the time of making the last mentioned will, Maria Howerton was the wife of the plaintiff, Thomas Howerton, and has continued such to the present time. That the plaintiff and his wife, Maria, had children born alive at the time of the making of the said will, and he entered into possession of the real estate so devised by the said Ann to his wife, and became seized of the same. That a bill in Equity was filed in the Court of Granville County, at the September Term thereof, in favor of Osborn Vaughan and others, against Samuel Dickens, the executor of James Vaughan, Thomas Vaughan, and Thomas Howerton, executors of Mrs. Ann Vaughan, praying, among other things, for a sale and division of the Nutbush land and manor-house and lot, in the town of Williamsborough, as devised by James Vaughan to Anne Vaughan, and by her to Mrs. Howerton. That a decree upon said bill was made at

September term, 1836, of the said Court of Equity, appointing Thomas Howerton, the plaintiff, commissioner to sell the land in question; that plaintiff did make sale of the said land according to the terms of the decree. That bonds for the purchase-money were taken, and by him filed in the office of the clerk and master, and approved by the Court; and the money subsequently collected by the clerk and master. That, in the year 1848, the defendant, as the administrator with the will annexed of James Vaughan, filed a petition in the Court of Equity aforesaid, praying that the fund in the office of the clerk and master might be paid to him, which, at the March term, 1849, was accordingly ordered and decreed; but that the plaintiff was not made a party to this petition, and that he had no notice of the proceeding, nor of the decree, before it was made. That in pursuance of this decree the money was paid to the defendant.

The plaintiff insists that, under the will of Mrs. Vaughan, he is entitled to a part of the said fund. He alleges that he has applied to the defendant for the same, and that he has refused and still refuses to pay him any part thereof.

The prayer of the bill is, that the defendant account and pay over to plaintiff such part of the fund as he may be entitled to, and for general relief.

The defendant demurred to the bill specially, for that Maria Howerton, the wife of the plaintiff, should have been made a party to the same; also, generally, for the want of equity.

The cause was set down for argument on the bill and demurrer, and sent to this Court under the act of Assembly.

Bailey, for plaintiff.
Graham, for defendant.

Pearson, J. There are so many difficulties in the way of the plaintiff, any one of which is a good ground for sustaining the demurrer, that we hardly know upon which to put our opinion.

Treating this proceeding as a petition in the cause, we are

informed that the cause was instituted in the Court of Equity for Granville County; so, this petition cannot be entertained in the Court of Equity for the County of Orange. To avoid this objection, the proceeding is styled "*in the nature of a petition.*" This is a novelty, but it does not meet the difficulty. Besides, we are informed that in the cause in Granville, at March term, 1849, a decree was made, directing the clerk and master "to pay over the fund to John Wimbish, which was accordingly done." We are not informed whether there has been a final decree or whether the cause is still pending in Granville "on further directions." If the former, in order to get rid of the decretal order directing the fund to be paid over to John Wimbish, there must be a bill of review; if the latter, there must be a petition to rehear in *the same Court*, and not something "in the nature of a petition" in another Court, praying a decree directly in the face of a decretal order, which still remains in full force and unreversed.

But if we treat this as an original bill, the difficulties accumulate. It asks the Court of Equity for Orange County, to decree that the defendant shall account with, and pay to, the plaintiff, a portion of a fund which the defendant received by force of a decree of the Court of Equity of Granville County, and is similar to an action of assumpsit for "money had and received," when the money has been recovered by a judgment.

Again, according to the plaintiff's own showing, if he is entitled to a portion of the fund, his wife is entitled to the balance; so, if he recovers his part in this original bill, he will then file another original bill in the name of himself and wife, for her part, making two bills and two accounts in regard to the same fund. This is literally "taking two bites at a cherry," an unnecessary splitting up of a cause, which the practice of this Court will not allow; its policy being to discourage a multiplicity of suits; so his wife is a necessary party.

Again, according to the plaintiff's own showing, his wife acquired title to the land mentioned in the pleadings, under the will of Mrs. Ann Vaughan; he entered and was thereof

seized, had issue, and became entitled to a separate estate in his own right, as tenant by the courtesy initiate; but he does not show that the title of either himself or wife has been divested and passed out of them, so the land still belongs to them: of course, they can have no title to the fund now in question, that being a matter which it concerns the purchasers, under the decree in Granville, to see to.

As a last resort, the plaintiff informs us that, at September term, 1853, of the Court of Equity of Granville County, one *Osborn Vaughan*, and others, filed a bill against Samuel Dickens, executor of James Vaughan, and Thomas Vaughan and Thomas Howerton, the plaintiff, executors of Ann Vaughan, praying for a sale and division of the land. An order of sale was made, and he, Thomas Howerton, (the plaintiff,) was appointed commissioner, and as such, sold the land. The sale was confirmed, the money paid in, and afterwards paid over, by a decree of the Court, to John Wimbish, (the defendant,) who was the administrator, with the will annexed, of the original testator, James Vaughan. We are not told who this Osborn Vaughan was, but presume he was one of the heirs-at law of James Vaughan, and that "the others" were the rest of the heirs-at-law. So, it seems they acted upon the assumption that the land belonged to them as heirs-at-law, and asked for a sale, for the purpose of partition among themselves, as tenants in common. We are unable to conjecture why the executors of James Vaughan, or of Ann Vaughan, were made parties; but there is no suggestion that the bill contained any allegation that the land, or any part thereof, belonged to the plaintiff, or to his wife; so, the land was sold as the property of the heirs-at-law, and the right of the plaintiff and his wife unaffected by the sale.

To the question how can Howerton and his wife make out any title to the fund, the answer is,—true, Mrs. Howerton has no title; but Howerton, the present plaintiff, is entitled to a portion of it by estoppel; and the argument is this: he is estopped, being a party of record. Estoppels are mutual; therefore, John Wimbish, the administrator with the will an-

nexed, cannot deny his title to a portion of the fund. This is a nonsequitur. It would hit nearer the mark, if aimed at the heirs-at-law, the land having been sold as their property; but it is a singular attempt on the part of the plaintiff, to take advantage of his own wrong, or rather his own folly, as a foundation for his title to a portion of this fund. Being a party to the bill filed by the heirs-at-law, he ought then to have alleged *title in himself and wife*, so as either to stop the sale, or join in and have his own title, as well as that of the heirs, sold, in which event he would have been entitled to a portion of the fund.

This distinguishes our case from *Armfield* v. *Moore*, Bus. R. 158, relied on by plaintiff's counsel. There, the petition alleged that the slaves belonged to James Moore, Elizabeth Carnes and Jane Moore, each being entitled to one-third, as tenants in common. This allegation was acted upon, and partition made; and it was held that James Moore could not gainsay this state of facts, or be heard to say that Jane Moore was not entitled to one-third part, and that it belonged to him, as the administrator of the deceased husband of the said Jane. Here, there was no allegation that the land belonged to the plaintiff, and no action was taken in respect to his title.

If one stands by, and sees his land sold as the property of another, and does not make known his title, he is, in most cases, on the ground of fraud, not permitted to set up his title against the purchaser. The idea that, if there is no fraud, but mere ignorance or folly in not making known this title, and in making sale as commissioner, he can afterwards claim a part of the purchase-money, is of the first impression.

PER CURIAM. Demurrer sustained, and bill dismissed with costs.

REUBEN L. HOLMES *against* ANN HOLMES *and another.*

Tenants in common are entitled to partition as of right.

The mode of partition between tenants in common, whether by an actual partition at common law, or by sale, is a matter to be determined by a Court of Equity, under the Act of Assembly, Rev. Code, ch. 82.

It is only upon a petition for a sale for the purpose of a partition, that the question is involved as to how the interest of the several parties will be affected by the one mode of partition or the other.

THIS was a PETITION by a tenant in common of a mill, against his co-tenants for a sale for partition.

Moses Holmes, the former owner of the mill in question, devised it in certain proportions to his son, the plaintiff, Reuben L. Holmes, and to his widow, and another son, named Cicero, (who is an infant,) as tenants in common. Shortly after the testator's death, violent controversies arose between the plaintiff and the defendant Ann, in regard to the mill and other matters, especially in regard to the employment of a miller. The plaintiff had put a free negro of bad character, by the name of Bob Valentine, in charge of the mill, who was strenuously objected to by the defendant Ann, and was, by her, turned out of it, and a slave of her own, by the name of Jim, put in his place; this slave was, in turn, driven out by the plaintiff, and Bob replaced. Sometimes the mill was locked, and the agent of one or the other party kept out; and at one time the defendant Ann, was refused admittance, and kept out by force.

The defendants Ann and Cicero, both answered; the first denying that she was to blame for the dissensions existing between her and the plaintiff; objecting to a sale of the property upon the ground that she had a large family dependent upon the profits of the mill, and that it would be greatly to her interest, and that of her infant son, the third tenant in common, that it should be continued as common property.

An order was made referring it to the clerk and master of Davidson County, to inquire and report whether it would be for the interest of the several parties that the property should

be sold. Much testimony was taken before him, upon the inquiry instituted under the order; but as it is all immaterial, under the view taken of the case in this Court, it is omitted.

The clerk and master reported that it was to the interest of all the parties that the property should be sold.

To this report the defendants filed various exceptions, which, for the reason as applying to the testimony, it is not deemed necessary to state.

The cause was set down for hearing upon the petition, answers, former orders, the report of the clerk and master, and the exceptions to the same.

His Honor, Judge Dick, sustained the exceptions to the report, and ordered the same to be set aside, also that the petition be dismissed. From which decree the plaintiff appealed to the Supreme Court.

Morehead, for plaintiff.
Mendenhall and *Bryan*, for defendants.

Pearson, J. This is a petition for partition. The petition alleges, that from the nature of the property, it cannot be divided without prejudice to the interest of all the parties, and prays that the mill may be sold for the purpose of partition, according to the Act of Assembly.

Tenants in common are entitled to partition, as of right; coparceners had this right at common law; the right is conferred upon joint-tenants and tenants in common by statute. The mode of assigning dower in mills, is to allow the widow every third "toll dish," or every third day, week, or month, etc. The mode of making partitition among tenants in common, was the same, each taking a toll dish alternately, or alternating, by each having the mill a specified time. This mode of making partition, was found to be inconvenient, if not impracticable; and to remedy this evil, among other things, the Act of Assembly above referred to, confers upon Courts of Equity the power to order a sale for the purpose of partition, when actual partition cannot be made without injury to some

or all of the parties interested. Rev. Code, ch. 82, sec. 8. The action taken in the Court below, was under an entire misconception of the rights of the parties. The defendants do not aver that an actual partition can be made without prejudice to the interest of the parties, but object to a sale on the ground, that it would be more for their interest, that the mill should be kept by the parties, as tenants in common. The reference to the clerk and master, is to report "whether the land and mill, mentioned in the pleadings, *should be sold.*" He reports that, in his opinion, that it would be for the interest of the parties that the mill should be sold. His Honor was of a different opinion, and ordered the petition, so far as it prays for a sale of the mill, to be dismissed. This, we say, was an entire misconception. The question was not whether it was for the interest of the parties to sell the mill, but whether it was not better to sell the mill, than to make actual partition in the common law mode! As to this, there can be no difference of opinion; any one at all acquainted with that kind of property, will say at once it is out of the question to try to run a mill where different parties are entitled to the alternate "toll dish," or alternate times. Suppose it to be allotted to the parties by alternate weeks, so that negro Jim, or whoever the defendants choose to put there, has the management for one week, and the next, it is put in the charge of Bob Valentine; how long would the neighbors continue to send to the mill? They could not have "standing bags," or allow grain or flour to stay over after each Saturday night, without the necessity of taking an account between Jim and Bob, as to what would be missing. Jim, on Saturday night, would leave the gates up; and no head of water for Monday. Bob would run gravel through the stones, and Jim would leave the mill running empty; rats would cut the bolting cloth, &c., &c., to say nothing on the subject of repairs; what are necessary; how they should be done; by what workmen, &c.

If it be said, should one party be in default, application could be made to a Court of Equity; admit it; but how soon

would the profits be absorbed by the costs, if the clerk and master was to be called on to report who was a suitable miller; what were the necessary repairs; what workmen, etc., etc.; in short, if the mill was to be taken in charge by the Court of Equity. The same objections apply to a jurisdiction of this kind, which induced the Court to refuse to attempt to give relief upon contracts in relation to co-partnerships. If parties, although bound by express contract to do business as co-partners, in a store for instance, cannot agree as to its management, a Court of Equity does not attempt to make them agree, nor to manage the business for them. The only relief is to enable them to dissolve, and to wind up the concern.

PER CURIAM. The order appealed from is reversed.

JOHN P. HAUGHTON *against* WM. BENBURY *and another, Executors.*

Where slaves are limited to a female, generally, and at her death, to another, on the contingency of her dying without issue, and the vendee of the husband of such female, with the fraudulent purpose of defeating the contingent estate, runs them out of the State; such remainder-man after the happening of the contingency, is entitled to relief in Equity against such vendee.

The measure of the relief of the remainder-man is the excess of the value of his contingent interest over that of the first taker, at the time of the fraudulent removal; his right to recover, in such a case, is not defeated or diminished by the death, or deterioration, of the slaves, after such vendee has fraudulently disposed of them.

Where, under a will, a tenant in common of slaves, entitled to the share of another on a contingency, joins in a petition for partition, setting forth his title under the will, and a decree is made for partition generally, such decree is no estoppel to that person's claiming an interest in such slaves, which accrued afterwards by the happening of the contingency.

CAUSE removed from the Court of Equity of Chowan County.

Jonathan Haughton died in the year 1835, having made a will, in which, among other things, he devised and bequeathed to four of his grand-children, George J. Barney, Mary

S. B. Haughton, Samuel T. Haughton, and the plaintiff, John P. Haughton, some land and a large number of slaves, (naming them,) with the following contingent limitation in remainder: "And should any of my above named grand-children die without issue, at their death, then, it is my desire that my above named real and personal estate shall go to the surviving grand-children above mentioned; and, if all of those survivors should die without issue, as aforesaid, then their shares, whether original, or accruing by survivorship, shall go to my aforesaid children then living, or their heirs." At February term, of Chowan County Court, following testator's death, upon a petition filed for that purpose, by a decree of the said Court, a partition of these slaves was made amongst the above named legatees, and their respective shares delivered to them by the executor to the above recited will. The legatee, Mary S. B. Haughton, shortly thereafter, intermarried with one John W. Roberts, who made a deed in trust of the slaves that had been assigned to his wife, under which the interest of the said Roberts was sold at public auction, to Richard B. Benbury, testator of the defendants. Before this sale took place, George J. Barney and Samuel P. Haughton had died without leaving issue at their deaths, which was well known to the defendant's testator when he purchased the slaves in question. These slaves were bought by the said Benbury at less than their real value, and immediately sold by him to a speculator, with a view and understanding that they should be carried beyond the limits of this State, and with the intention of defeating the contingent interest of the plaintiff. This sale to the testator, R. B. Benbury, and resale to the slave-dealer, was made in the Spring of the year 1842, and the slaves immediately carried out of the State to parts unknown to the plaintiff. Mary S. B. Haughton, (afterwards Roberts,) died about the year 1851, without leaving issue at her death; and within twelve months thereafter, the plaintiff became of age, and shortly thereafter brought this suit. Richard B. Benbury died about the year ———, having made and published his will, in which the defendants

were appointed executors, who qualified and received assets beyond the amount of the plaintiff's claim.

The plaintiff insists, that by the deaths of the several co-legatees, leaving him surviving, he became entitled, under the will of Jonathan Haughton, to the share of the said slaves that had been allotted to Mary S. B. Haughton, and that they having been fraudulently removed beyond the limits of the State by the said R. B. Benbury's agency, and being thus put beyond the reach of any legal or equitable remedy which he might have had, his personal representatives are liable to account to him, out of the assets in their hands, for the value of the said slaves with their increase, as well as for the hires since the death of Mrs Roberts; and the prayer of the bill is according to this view of the case. The plaintiff also prays for general relief.

The answer of the defendants sets up, and insists, that the decree of partition by which the slaves in question were assigned to their intestate in absolute right, to which plaintiff was a party, estops him from claiming this property; and further, that, if he has any right at all, his remedy is in a Court of Law, and not in this Court.

There was replication to the answer, commissions and proofs; and the cause being set down for hearing, was sent to this Court by consent.

Hines, for plaintiff.
Smith, for defendants.

PEARSON, J. It is well settled, that a Court of Equity will protect the interest of one entitled to a "limitation over" in slaves, after the termination of a life-estate.

If the party is vigilant, and makes application before the slaves are carried out of the State, the relief is plain; i. e., a bond for the forthcoming of the slaves at the termination of the life-estate, which is enforced, if necessary, by a writ of sequestration. When the application is not made until after the slaves are removed, the extent of the relief that will be

given is not settled. In *Cheshire* v. *Cheshire*, 2 Ire. Eq. 573, the slaves having been run out of the State and *sold* before the bill was filed, the Court say, "the defendants are unable to get back the slaves, either at Law or in Equity, from the present holder; therefore the plaintiff cannot get relief on the particular prayer in his bill, (a bond for the forthcoming of the slaves at the death of the tenant for life); but he now elects to take the purchase-money received by the defendant, and claims this under the prayer for general relief; and we are of opinion that he is entitled to it, with interest, from the death of the tenant for life." She died pending the suit. So, according to this case, when the entire estate in the slaves has been sold, the relief is a decree for the purchase-money, *minus* the interest during the life of the tenant for life, the bill being filed *soon after* the slaves were taken off and sold. In *Lewis* v. *Kemp*, 3 Ire. Eq. 233, the bill was not filed until after the death of the tenant for life; some of the slaves were on hand at his death, but he had sold the others, and they had been taken out of the State many years before, and had not been heard of for more than seven years. In regard to the former, the decree is, that they, together with their increase, be delivered over by the executor of the tenant for life, to the remainder-man, with an account of the hires. In regard to the latter, the Court, assuming that they had been removed out of the State by the tenant for life, with an intent to defraud the remainder-man, declare that the plaintiff is entitled to relief, but not to the particular relief he seeks, (i. e., the value of the negroes sold, together with their increase since, and an account of hires since the death of the tenant for life); and the Court say, "upon the death of the tenant for life, his estate is answerable to him in remainder for the value of the chattel sold, to be estimated at the time of the sale, together with interest from the death of the tenant for life. If, however, the chattel sold, (a negro for instance,) has died during the life of the tenant for life, we hold that the remainder-man has no claim for its value upon the estate of the tenant for life; so, if the chattel has become deteriorated before the life-

estate falls in, he is only entitled to that which remains, and the value would be estimated at the time of the death of the tenant for life, with interest from that time." It was, therefore, referred to the master to report the sums for which the defendant, as executor, is answerable, upon the principles declared. Before the master, the defendant showed that he had no assets, except to some small amount, and the case passed off without any definite action, being remanded to the Court below, where it was probably compromised. It had been previously held in an action at law, for one of these same negroes, "that if the negro had died in the life-time of the tenant for life, the remainder never took effect; that, whether the negro had died before the tenant for life, was a question of fact for the jury; that, when a person is proved to have been alive, the presumption is that he continues to live, until the contrary appears; but this presumption ceases if he is not seen or heard of in seven years; and the presumption that he is dead gets stronger and stronger, the longer it is after this that he is not heard of." This was the ruling in the Court below, which, upon an appeal, was approved of by this Court. *Lewis* v. *Mobley*, 4 Dev. and Bat. 323. So, according to this case, if the slave dies during the continuance of the life-estate, the remainder-man is not entitled to a decree for his value at the time he was sold, and taken out of the State, nor to the purchase-money, minus the interest during the life of the tenant for life.

In *Lee* v. *McBride*, 6 Ire. Eq. 533, it was declared in the Court below that the purchaser of a particular estate in a slave, who, in fraud of the remainder-man, carried the slave out of the State and sold him, was liable to the remainder-man for the purchase-money, with interest. On an appeal the decree was reversed, upon the ground that there was no sufficient proof to sustain the allegation of fraud, and the bill was dismissed. In delivering the opinion, the extent of the relief to which the plaintiff would be entitled—assuming the slave to have been sold and carried out of the State with an intent to defraud the remainder-man—is discussed. It is there

said, "the remainder-man is not entitled to the purchase-money, with interest from the bill filed, *without regard to the value of the particular estate, or that in remainder*, either at the day of sale, or of the decree pronounced;" for, that would amount to a forfeiture of the particular estate; and after some remarks in reference to the difficulty of laying down a rule as to the extent of the relief to which the remainder-man is entitled, the question is left open.

After an examination of the cases, and a full consideration of the principles involved, we are satisfied, that when a slave is sold with an intent to defraud the remainder-man, although the slave dies during the life of the tenant for life, still the remainder-man may elect to ratify the sale, and is entitled to a decree for such part of the purchase-money, with interest thereon from the day of sale, as will bear to the whole sum the proportion of the value of his estate to the value of the whole. In other words, the purchase-money should be divided between the owner of the particular estate and the remainder-man, in proportion to the relative value of their respective interests. Upon the same principle, that a tenant in common, when the property is sold out and out by his cotenant, may either follow the property, or may elect to have his share of the purchase-money, or when the property is destroyed, or taken to "parts unknown," may claim his share of its value. It is certain the owner of the particular estate cannot object to this rule; the objection to it is, that it is too favorable to him, as, to some extent, he is allowed to take advantage of his own wrong, and to force the remainder-man to consent to the sale. On the other hand, this Court cannot punish the particular tenant by declaring his estate to be forfeited; and the remainder-man is at liberty, if the property is still in esse, to follow it, or, if he is not able to do so, he is entitled to the purchase-money, if it has been sold, or to its value, if it was run out of the State, *minus* the interest during the life-estate. If the property die during the life-estate—had there been no wrong attempted—the remainder-man, would, of course, get nothing; and, under the circumstances,

a proper compensation for the fraud attempted on the part of the particular tenant, is to require him to pay the relative value of the remainder, as compared with the value of the particular estate at the time of the conversion.

In all the cases to which we have referred, the limitation over was after a life-estate. In our case the entire estate is given to the first taker, determinable upon a contingency, and the limitation over to the plaintiff depends upon the happening of that contingency, and also, upon the fact of the plaintiff's being the survivor; so, that the executory bequest, under which he is entitled, was uncertain as to the event, and also uncertain as to the person.

We have no doubt that the principle upon which relief is given applies to our case; but the uncertainty of the plaintiff's intent at the time of the wrong committed, necessarily affects the mode of obtaining relief, and, to some degree, its extent.

We are satisfied from the proofs that, the testator of the defendant, after he had purchased the interest of John W. Roberts, (who, by his intermarriage with Mary S. B. Haughton, had become entitled to the entire estate in the slaves now in controversy, subject to be determined upon her death without issue then living,) sold the slaves to a negro-trader, with the expectation that he would immediately carry them out of this State, thereby intending to defeat any interest that might afterwards accrue to the plaintiff, or any of the other legatees under the will of Jonathan Haughton. But it was the misfortune of the plaintiff that his interest had not then accrued, and now it is his misfortune not to have offered any proof to repel the presumption of the death of the several slaves, arising from the fact that they have not been seen or heard of for more than seven years; he must, therefore, be content, under the rule above announced by us, to take a decree for the value of his interest, as compared with that of the defendant's testator at the time of the sale, as to which there will be a reference, and in regard to which, according to the proofs, there can be no difficulty; because the evidence shows the price given by the

defendant's testator for the interest of John W. Roberts, and also, the price he obtained when he shortly afterwards sold the slaves out and out. If it is said that this is allowing the defendant to take advantage of his own wrong, the reply is, suppose the defendant had killed the slave, the plaintiff could only recover the comparative value at the time the act was committed, and yet, that would be a greater wrong than sending him out of the State. If a female slave be given to A for life, remainder to B, and a third person kill the slave, surely B could not expect to recover what would be supposed to have been her value and that of the children she might have had, at the time the life-estate falls in.

The point made by the defendant's counsel, upon the question of estoppel, is not supported by the cases cited. *Armfield* v. *Moore*, Bus. 157; *Fanshaw* v. *Fanshaw*, Ibid. 166.

The petition for partition was filed to carry out the directions of the testator, and the petitioners set out their title to the entire estate, under the provision of the will. It was not necessary for them to set forth the fact that their estates were determinable upon certain contingencies, for the will directed that there should be a partition. It is a well settled rule upon the subject of estoppels that, "if any estate passes" there can be no estoppel upon this ground, that, a deed cannot operate as a conveyance, and also, as an estoppel. Here, the entire estate passed, determinable upon a contingency; so the doctrine of estoppel has no application.

PER CURIAM. The plaintiff is entitled to the value of his interest in the slaves at the time of the sale by the defendant's testator, with interest from that time; and there must be a reference, unless the parties agree as to the amount.

KINCHEN KEA *against* SABRA COUNCIL *and another.*

The statute of limitations, Rev. Stat., ch. 65, sec. 19, applies to a right of redemption arising from construction of a Court of Equity, and the time must be computed from the accrual of the right to sue.

Where the owner of slaves had mortgaged them, and the time for redemption was several times postponed by memoranda on the mortgage deed, and finally the right to redeem rested on the parol promise of the mortgagee, to let the mortgagor redeem at any time; but after three years the property was sold by a constable, who had executions against the mortgagor, by consent of the parties, on the terms of first satisfying the mortgage debt, and bought by the mortgagee, who held possession for fourteen years under that purchase, denying the right to redeem; *Held* that the Statute was a bar, and that an agreement to refer the question of redemption to arbitration, which was violated by the mortgagor, did not revive it.

Cause removed from the Court of Equity of Bladen.

In the year 1835, the plaintiff, being much embarrassed, applied to the defendant Sabra, and at various times during that year, received from her certain sums of money, amounting, in all, to $925; and to secure the payment of that amount, executed to her an absolute bill of sale for a certain slave, named Molly, and her child, Henry; and subsequently, upon a further loan, he executed a like bill of sale for two other slaves—John, the child of Molly, and Jack, her husband; and upon the execution of these conveyances, the slaves were placed in possession of the said Sabra; at the same time she executed "certain paper writings," in each of which was set forth in substance, that these bills of sale were, in truth, mere securities for the sums of money then loaned; and that, whenever these sums were paid to the defendant Sabra, she was to reconvey the property to the plaintiff. On the 26th of January, 1836, these two paper-writings were surrendered to the defendant Sabra, and in lieu thereof the following instrument of writing was executed, and delivered by her to the plaintiff, viz: "I, Sabra Council, do hereby covenant and agree to, and with Kinchen Kea, that if he, or his heirs, will, on or before the 6th day of January, 1837, pay to me or my heirs, the sum of nine hundred and twenty-five dollars, ($925,) I, or my

heirs, will convey to him, or his heirs, by delivering all proper deeds of conveyance of a certain negro woman, named Molly, and her son, Henry, and her son, John, also her husband, named Jack."

On the 6th day of January, 1837, the following memorandum was added to the above instrument: "This is to certify that the above agreement is continued until the first day of June next. On a subsequent day, not recollected, there was added to the same instrument of writing this further memorandum: "Further agreement until January, 1838."

The bill alleges that, during the year 1838, the defendant, Sabra stated to the plaintiff that it was unnecessary that any further agreement should be made in writing, for that he might redeem the said slaves at any time when he might be able to do so; and that relying implicitly on the assurance of the said defendant, he made no special efforts to redeem the said property.

On the 1st of January, 1841, one John G. Sutton, a constable, with the consent of the said Sabra, exposed to sale at auction, the said four slaves, also, two other slaves, the children of the said Molly, named William and Nanny, born subsequently to the said conveyance, by virtue of certain justices' judgments and executions which he had in his hands, to the amount, in all, of between three and four hundred dollars. The defendant Sabra appointed the defendant Kinchen K. Council her agent to attend the sale and buy in the property; that the said agent did buy the said slaves as the avowed agent of the said Sabra, declaring at the same time that they were sold, in the first place, to satisfy the debt as aforesaid, due the defendant Sabra, and if there was any overplus it was to go to the satisfaction of the executions in the hands of Sutton; and the plaintiff alleges that, for the purpose of preventing competition, the said agent declared, at the said sale, that nothing but specie would be received on any bid that might be made for any of these slaves, and that the said defendant was thus enabled to buy all the said slaves, except the

child, Nanny, for the defendant Sabra, and that he, the said K. K. Council, bid off this latter slave for himself.

The plaintiff, in his bill, alleges that the gross amount of the sale of these slaves was $1429,50, which was greatly below their true value at that time, and much less than they would have brought at an execution sale, had such sale been conducted without the oppressive interference of these defendants.

The plaintiff further alleges that, since this sale, he has made frequent applications to the said Sabra for permission to redeem the slaves in her possession, and that she has always professed to be willing to come to a fair and equitable settlement and account in reference to these slaves; but she, at the same time, insisted that she would retain the slaves, as she had bought them at the constable's sale, but she was willing to pay a fair price for them, if she had not already done so. He further alleges that, from time to time, he has offered to pay the amount of his indebtedness to her and redeem the slaves; to all which offers she has replied, in substance, that she wished to keep the slaves, and that plaintiff could buy others in their stead.

The plaintiff alleges that the defendant Sabra is the plaintiff's sister, and the defendant Kinchen K. Council is her son; that from the first of this transaction up to the fall of 1854, plaintiff has been greatly embarrassed; that these facts, with the fact that he had great confidence in the integrity and good feelings of the defendants, caused him so long to delay this alternative of a suit. In the fall of 1854, however, with the assistance of a friend, he was able to tender her the amount due for principle and interest, and did tender her that amount, demanding, at the same time, the slaves in question, with their increase and profits, when she professed a willingness to settle, but wished it postponed until she could see her son, the other defendant, who had been her agent in the business. Afterwards, on the 6th of October, 1854, through an agent, he again applied to the defendant to redeem said slaves, and for an account, when an agreement was entered into in writing between the parties to submit the matters in contest

between them to the arbitrament of two disinterested individuals; that the plaintiff appointed one David Cashwell, and the defendant's agent appointed one John O. Daniel, when the parties met according to the agreement and submitted the matter with their writings and proofs, to the said arbitrators, who, not being able to agree, appointed an umpire to decide the matter, when the defendant Sabra, by her agent, the other defendant, immediately receded from the agreement to arbitrate, and declared to the plaintiff that if he ever got anything from the defendants it would be in the Courts of the Country.

The bill was filed in March, 1855. The prayer of the bill is for a redemption of the slaves and an account, also for general relief.

The defendants demurred generally for the want of equity in the plaintiff's bill. Joinder in demurrer.

The cause being set down for argument on the bill and demurrer, was heard before his Honor, who overruled the demurrer, and the defendants appealed.

Wm. A. Wright, for plaintiff.
Troy, for defendants.

Battle, J. The statute of limitations, upon which the defendants rely as a bar to the plaintiff's right of redemption, enacts that, when a mortgagor of personal property shall fail to perform the conditions of the mortgage for the space of two years from the time of performance specified in it, or shall omit for that period after the forfeiture of the mortgage, to file a bill, claiming the equitable right to redeem, such mortgagor shall be forever barred of all claim in Equity to such personal property. 1 Rev. Stat. ch. 65, sec. 19; Rev. Code, ch. 65, sec. 16. In the case of *Bailey* v. *Carter*, 7 Ire. Eq. Rep. 282, it was held that this statute "applied to a right of redemption arising by a construction of a Court of Equity, and the time must be computed from the accruing of the right to sue." Whether the present is to be regarded as the case

of an express mortgage, or as one arising by construction of the Court of Equity, is immaterial; for it is clear that in either case the time of performance cannot be brought down to a more recent date than the time of the sale of the slaves by the constable in the year 1841; for, after that time, the bill itself states that the defendant Sabra Council always insisted that she would retain said slaves, as she had bought them at the sale made as aforesaid by John G. Sutton, but that she was willing to pay a fair price for them, if the price paid at the said sale was not their fair value; and that when the plaintiff several times afterwards offered to redeem the slaves, she always replied that "she wished to keep the said slaves," and that the plaintiff could buy others in their stead. The bill was not filed until the year 1855, so that it is clear the plaintiff has lost his right of redemption, unless some transaction has taken place between the parties to revive it. The plaintiff contends that the agreement in writing to submit to arbitration the matters in controversy between the parties in relation to the mortgage entered into in 1854, does have the effect to displace the bar of the statute, and thereby revive his right of redemption. Without deciding, or even intimating an opinion, whether a distinct written acknowledgment of the mortgage as still subsisting, would have the operation contended for by the plaintiff, we hold, very decidedly, that the instrument referred to does not recognise the mortgage as still existing and binding between the parties. It does indeed state that there had been a mortgage, but it states also that the slaves had been sold by a constable, and purchased by the defendant Sabra; and then it sets forth that the parties agree to refer the matters in dispute between them, in relation to the mortgage, &c., to arbitration. Now, what was the matter in dispute in relation to the mortgage? Clearly, that after the sale in 1841, the plaintiff claimed the right to redeem the slaves and the defendants denied it. The agreement to submit that dispute to arbitration certainly cannot have the effect to acknowledge the plaintiff's right to redeem; for, if it does,

then the defendant Sabra gave up her cause the moment she agreed to appoint judges to decide upon it.

Whether the plaintiff can have any relief upon the written contract to refer the matter to arbitration, is not a question now before us. We are clearly satisfied that his equity to redeem the slaves is barred. The demurrer must be sustained and the bill dismissed.

PER CURIAM. Decree accordingly.

STEPHEN BAGLEY, ADM'R., AND OTHERS *against* JAMES H. SASSER AND OTHERS.

The admissions of a husband are not competent to affect the sole and separate interests of his wife.

A parol promise by a husband to pay for land settled by third persons on his wife and children, is void under the statute of frauds, &c.

A promise to pay a debt out of a particular fund, which never came to hand, is not obligatory.

CAUSE removed from the Court of Equity of Johnston County.

The material facts of this case are stated in the opinion of the Court.

Husted, for the plaintiffs.
Moore, for the defendants.

NASH, C. J. The bill is filed by the plaintiffs, to obtain a decree to sell a tract of land, held in trust for the sole and separate use of a married woman and her children, to discharge a debt due from them—a debt of their own contracting. The application is a singular one, and certainly one of first impression. It appears that the defendant James H. Sasser, is a pastor of a baptist church, of which the complain-

ants are members. "Being in reduced circumstances, with a large family and without a permament home, the plaintiffs, with others of the church-members, agreed to purchase for his family a tract of land, for which they were to give the sum of $525; two hundred dollars of this sum were raised by subscription, and paid over to Mr. Hamant, the owner of the land, and for the balance, the purchasers gave their note, which is due, and they seek to sell the land to pay it off. The deed executed by Hamant to Thomas Bagley, is an exhibit in the case. By it the land is conveyed to Thomas Bagley, his heirs and assigns, for the sole and separate use of Appy Sasser, the wife of the defendant James H. Sasser, and her children, and after her death, to the use of such children of her present marriage, as might survive her. The equity upon which the plaintiffs rely, is an allegation, that it was a part of the contract of purchase, that if the money to pay for the land could not be raised by the plaintiffs, the amount due should be paid out of the money which Mrs. Sasser expected to receive from her father's estate, and for which a suit was then pending in the Supreme Court, or that the money might be raised by a sale of the land, and that this provision was omitted by mistake. This statement is denied, and is not supported by the proof; Mr. Hamant is the only witness who speaks to the matter, and his testimony as to the remarks of James H. Sasser, (waiving all objections to it,) is as to observations made by the latter, after the deed was executed. It was after that remark, that Thomas Bagley, the trustee, and one of the parties to the bond observed, "then it ought to be in the deed," plainly showing that, up to that time, there was no such agreement, and that its omission was not a matter of mistake. But, independently of that circumstance, James H. Sasser was no party to the deed, and took no interest under it; his declarations, therefore, cannot affect the defendants.

Putting aside all objections which might be urged to granting to the plaintiffs the relief they seek, supposing the fact to be as alleged, we have to say, that the plaintiffs have failed to sustain, by their proof, the allegation of mistake. As to

the promise of Sasser, if made, it cannot affect this question. 1st. It was a mere verbal promise on his part, to pay the debt of another. 2nd. If good, he was to pay out of a particular fund, which he never received.

PER CURIAM. Bill dismissed, with costs.

THOMAS F. JONES, EX'R., *against* ISA B. GORDON AND OTHERS.

Where slaves, advanced by A to his son B, were, on the death of the son, divided between his widow and children, and held adversely thereafter for three years, A, the father, is barred by the statute of limitations from afterwards reclaiming them.

Where one was appointed Administrator, and an entry of record made to that effect, and a bond given without security, his appointment is valid.

A bequest of "all my other negro slaves to the American Colonization Society," (some being previously willed) will pass, as well those held in common with another, as those held in severalty.

CAUSE transmitted from the Court of Equity of Perquimons.

Benjamin Gordon died intestate in the year 1841, possessed of certain slaves which had been given to him by his father, John C. Gordon, by parol, and the plaintiff Thomas F. Jones was appointed his administrator in 1842. At February Term, 1845, of Perquimons County Court, an order of partition was made of all the slaves belonging to the said Benjamin's estate; and those in question were duly assigned to his two daughters, Mary L. and Isa B. Gordon, by commissioners, and sanctioned by a judgment of that Court. Previously, however, to such order, the administrator made known to J. C. Gordon, the father of Benjamin Gordon, that he held those slaves as part of the estate of his intestate, and was ready to deliver them, provided he said so. He declined receiving them, and desired the administrator to treat them as the other property of the estate.

Upon this partition, Mrs. Gordon took possession of her part

of the estate, which embraced other slaves than those derived from J. C. Gordon, and also of the slaves in question, as the guardian of her two daughters, and hired them out, from year to year, until her death, in 1854; no division having been made between the daughters.

Previously to the death of her mother, Mary L. Gordon died intestate, under age and unmarried, leaving her mother and her sister, Isa, her next of kin and distributees. Henry W. Barber applied for administration on her estate, and was ordered to be appointed, on giving bond and security. He signed a bond himself and left it in the office, but it was not signed by any surety; though he admits his willingness to act if his appointment thus made be valid. He is made a party defendant to this bill, and states to that effect in his answer. The property held in common between the two sisters had never been divided between them before the death of Mary L., nor afterwards was the joint interest of Isa and her mother ever divided between them, previously to the mother's death.

Maria L. Gordon, the mother, made a will, in which she bequeaths as follows:

"Secondly. I give my negro man, Jack Blount, to my brother Thomas F. Jones, he knowing that I so give him, that Jack may enjoy every comfort."

"Third. I give all my other negro slaves to the American Colonization Society, provided the said negroes are willing to go to Liberia, and provided the Colonization Society is willing to receive them and send them to Liberia."

The plaintiff was appointed executor and accepted the office.

The slaves embraced in this latter clause, had expressed their willingness to go, and the American Colonization Society had signified its willingness to accept the trust of sending them to Africa.

The prayer of the bill is for a partition of the slaves held in common between the two daughters, and then of those held in common between Mrs. Gordon and her daughter Isa; and for a decree directing the plaintiff as to his duty in delivering the slaves to the said society, so that he may be protected.

The facts above stated are agreed to in a written statement, filed as evidence in the cause, and the answer of the defendant Barber is substantially to the same effect.

The cause was set down for hearing upon the bill, answer and exhibits, and sent up by consent.

Smith, for the plaintiff.
Heath and *Hines*, for the defendants.

Nash, C. J. According to the facts admitted, John C. Gordon, the father of Benjamin Gordon, who died in 1841, might have reclaimed the negroes which he had previously put into his possession; but he is now barred by the statute of limitations. After the death of Benjamin Gordon in 1841, Thomas F. Jones, his administrator, took the negroes into his possession, and so held them until 1845, when, under an order of the proper court, they were divided between the widow, Mrs. Maria L. Gordon, and the two children of her husband, Mary L. and Isa Gordon. Mrs. Gordon was duly appointed the guardian of her two children, and, as such, took into her possession the slaves allotted to them, and as such held them, up to the time of her death in 1854. From the time of the partition, the possession of Mrs. Gordon and her children was adverse to the claim of John C. Gordon, who is still alive. His claim is barred by the statute of limitations.

Mary L. Gordon died before her mother, whereby the latter, together with Isa Gordon, became entitled to her personal property as her next of kin. Mr. Barber applied to be appointed administrator upon her estate, when the usual order was made appointing him her administrator, upon his entering into bond with security according to law. He took the usual oath and executed an administration bond, which, however, was never executed by his sureties. He doubts whether he is in law duly appointed. The following cases fully establish the validity of his appointment: *Spencer* v. *Cahoon*, 4 Dev. Rep. 225, and 1 Dev. and Bat. Rep. 27, and *Davis* v. *Lanier*, 2 Jones' Rep. 307.

Mrs. Maria L. Gordon died in 1854, after having made her last will and testament, in which she leaves to her brother Thomas F. Jones, and who has duly qualified as her executor, a favorite negro man by the name of Jack Blount. In the succeeding clause she bequeaths as follows: "I give all my other negro slaves to the American Colonization Society, provided said negroes are willing to go to Liberia, and provided the Colonization Society is willing to receive them, and send them to Liberia."

The question is presented, whether the bequest to the Colonization Society embraces the interest which Mrs. Gordon had, as one of the next of kin, in that portion of the slaves which fell to Mary L. Gordon on the partition in 1845, or whether it is confined to those which were allotted on that partition to Mrs. Gordon. We are of opinion that the bequest of emancipation extends, not only to all the slaves of Mrs. Gordon and their increase held by her in severalty, but also to the slaves which may be allotted to the plaintiff as her representative, upon a partition among the next of kin of Mary L. Gordon. *Cox* v. *Williams*, 4 Ire. Eq. 15.

The Colonization Society has agreed to receive the negroes upon the terms proposed in the will, and the slaves have agreed to go to Liberia.

The plaintiff is entitled to a decree for the partition of the slaves held in common by Henry W. Barber as administrator of Mary L. Gordon and her sister Isa, and also to a decree for partition of the slaves which shall be allotted to the administrator, between said administrator and the plaintiff; and also to a decree that the plaintiff deliver over to the American Colonization Society all the slaves embraced in this opinion as of the property of Mrs. Mary L. Gordon.

Per Curiam. Decree accordingly.

JOHN C. PETTIJOHN AND ANOTHER *against* HENRY WILLIAMS AND ANOTHER.

It is too late for a party to complain of a fraud in the quality of the thing sold, and seek for a rescission of the contract after he has used it for two years—has tested its qualities—has assigned his interest in it, and the thing itself has so deteriorated in value, that it cannot be restored in the same plight and condition as when it was received by him.

This cause was before the Court upon an appeal from an interlocutory order of the Court of Equity of Martin County, and heard at the December Term, 1855, (ante 302.) The case is now brought up for a final hearing, and the facts are sufficiently stated in the report of that decision.

Rodman, for plaintiffs.
Smith, for defendants.

Pearson, J. When this case was before us at December Term, 1855, (ante 302,) a suggestion was made (for the consideration of counsel) that the plaintiff was too late in making his application, for the reasons which are there stated, and reference was made to the principle established by the case of *McDowell* v. *Simms*, Busb. Eq. 130. The question is now presented for a direct decision. There has been no amendment of the pleadings; no additional facts are brought out by the proofs, nor have we been favored with any argument of counsel to meet the difficulties which are there plainly pointed out as standing in the way of the plaintiffs. The consideration which we then bestowed upon the subject, inclined us to an opinion against the plaintiffs; the reflection which we have since bestowed upon it, satisfies us that the plaintiffs, at the time the bill was filed, had no equity, and that the principle established by McDowell v. Simms applies to our case.

Per Curiam. Bill dismissed.

CATHARINE M. CAMPBELL *against* PATRICK MURPHY AND OTHERS.

The jurisdiction of Courts of Equity over the subject of dower is well established. It is often the most convenient, and sometimes the only jurisdiction that can afford the appropriate relief. Especially is this the case when the widow seeks to be endowed of an equity of redemption.

There is no statute of limitation in regard to the writ of dower; and if her case be not affected by the statute of presumptions, the widow is not bound to account for a delay.

If there be no prayer against the administrator, he is not a necessary party to a bill for the assignment of dower.

The right of a widow to dower is a *legal right*; it is *prior* to that of the heir; and his vendee is not protected by a want of notice and payment of a full price.

A widow is not entitled to have dower of the improved value of her husband's estate, but she must take it according to the value as it was in his life-time.

A widow is entitled to a part of the insurance-money arising upon the destruction of buildings in which she had an equitable claim to dower.

She is also entitled to a third of the rent accruing thereon between the death of her husband and the decree of assignment.

CAUSE removed from the Court of Equity of New-Hanover County.

The bill was filed at the Spring Term, 1851, seeking the assignment of dower in a valuable lot in the town of Wilmington. The plaintiff intermarried with her late husband, Marsden Campbell, in the year 1834, and very shortly after that they removed to the State of Louisiana, and have never since returned to North Carolina. On the 18th of October, 1841, Marsden Campbell, the husband, died seized in fee of an equity of redemption to the lot in question. The lot had been mortgaged to one Holmes, in 1834, and at the time of Marsden Campbell's death there was still a balance due on the mortgage debt. This, however, was paid off by the defendant William S. Campbell, the administrator appointed upon the husband's estate in Louisiana; and under a petition filed by the heirs-at-law in the Court of Equity of New Hanover, (to which the plaintiff was not a party,) a sale of the lot in ques-

tion was made by the clerk and master of that Court to the above named Wm. S. Campbell, at the price of $4000, and he afterwards, in the year 1845, sold the same to the defendant Patrick Murphy, for about the same price.

After the death of Marsden Campbell, and before the sale by the clerk and master, to wit, in 1843, the buildings on the lot in question were burnt and destroyed with fire, and having been insured, the said Wm. S. Campbell, as administrator, received the sum of $4000, as insurance money.

Up to the time of the destruction of these buildings, they were taken possession of and rented by the heirs-at-law.

The bill of the plaintiff sets forth that, shortly after the death of her husband, she enquired of Wm. S. Campbell, in whom she had great confidence, whether she was not entitled to dower in the lot and buildings in question, who assured her that he had consulted a lawyer of respectable standing in North Carolina, and had been advised by him that she was not entitled, and upon that assurance she rested until she was better informed, shortly before the bringing of this suit.

She alleges that her husband died seized of other lands in North Carolina, and possessed of a large personal estate in Louisiana, which have respectively gone into the hands of the heirs-at-law and of the defendant Wm. S. Campbell, the administrator in Louisiana, and that there has not been any administration on the estate in this State.

The prayer is for dower, for an account of the rents and profits, and for a portion of the insurance money.

The heirs-at-law of Marsden Campbell, and Wm. S. Campbell, the administrator appointed in Louisiana, and the purchaser of the lot, Patrick Murphy, are made defendants.

The defendant Murphy alone answered. He insists upon the length of time elapsed between the death of Marsden Campbell and the filing of this bill; he also avers in his answer that he is a purchaser for a fair price, and without notice of the plaintiff's right to dower, and he submits that he is not liable on that account. He also objects that there should have been

an administrator in this State who should have been made a party to this suit. Replication, commissions and proofs.

The cause was set down for hearing upon the bill, answer, exhibits and former orders, and sent to this Court by consent.

for plaintiff.

Bryan and *W. A. Wright*, for defendants.

Pearson, J. The right of a widow to dower is a legal one, for which there is a remedy at law. But the inconveniences attending assignment at law, the necessity in almost every case for a discovery, by reason of the fact that the title deeds belonged to the heir, and for an account of the mesne profits, when any length of time intervened from the death of the husband to the time of the assignment, gave rise to a convenient jurisdiction in Equity, where complete relief is given; with the exception that, if the title of the plaintiff to be endowed be denied by the answer, that right must be sent to a Court of Law, to be tried by a jury. *Curtis* v. *Curtis*, 2 Bro. C. C. 631; *Mundy* v. *Mundy*, 2 Ves. 122; *Pulteney* v. *Warren*, 6 Ves. 76; *D'Arcy* v. *Blake*, 2 Sch. and Lef. 387.

Although our statute (Rev. Code, ch. 118,) gives to the widow a more direct and summary remedy than the writ of dower at common law, there is no reason to suppose that there was an intention to take away the jurisdiction which Courts of Equity had assumed over the subject. On the contrary, the intention was to give a cumulative remedy; so that the widow has an election to proceed in either mode. Indeed, in some cases, the jurisdiction is highly beneficial, if not absolutely necessary, to do entire justice, notwithstanding the remedy given by our statute. The case now before us presents an apt illustration, and shows that the widow was well advised in making her election to proceed in this Court. At the death of the husband, the premises were under mortgage, and her right depended upon our statute giving dower in equities of redemption. Although this circumstance does not prevent the assignment by the summary proceeding at law—see

Thompson v. *Thompson*, 1 Jones' Rep. 430—yet an application to equity will, in almost all cases of the kind, become necessary, in order to have the incumbrance discharged; and consequently the application may, with great propriety, be made to that tribunal at the outset. The house standing on the lot, after the death of the husband, was consumed by fire; in consequence thereof, a large sum was paid by an insurance company. This constitutes a fund, the distribution of which, comes within the peculiar province of a Court of Equity. The widow, in ignorance of her rights, (as she alleges,) failed to make application for nine years, during which time the house was burnt, insurance money was paid, the lot sold, and the purchaser has erected other buildings thereon, at a cost of some $22,000. All these circumstances made it fit and proper to apply to this Court.

The relief asked for is resisted on several grounds:

1. The "statute of limitations" and lapse of time.

The statute of limitations to a "writ of right" is sixty years; to a formedon, fifty years, (afterwards reduced to twenty); to a writ of entry, thirty years. The writ of dower is in the nature of a writ of right; there is no statute of limitation in regard to it; for the reason, we suppose, that none was thought necessary; for the right ceased at the death of the widow, which would, in most cases, happen before the expiration of sixty, fifty, or even thirty years. The lapse of twenty years raises a presumption of the abandonment of the right of redemption of mortgages, and of other equitable rights, independently of any statute. Our statute reduces the time to ten years. The husband of the plaintiff died in October, 1841; this bill is filed at the Spring Term, 1851; so, the ten years had not expired, and no explanation of this delay is necessary. But if it had been, the allegations of the bill sufficiently account for it. The plaintiff and her husband removed to Louisiana in 1834, and she has never returned to this State. She avers that, as the lot was under mortgage at the time of the death of her husband, being uninformed of the existence of a statute giving the wife dower in an equity of redemption, she was ignor-

ant of her rights until a short time before this bill was filed; that soon after the death of her husband, she asked the advice of William S. Campbell, one of the defendants, who was the administrator of her husband in Louisiana, and in whom she had great confidence, and was told by him that he had taken the opinion of a respectable lawyer in North Carolina, who advised him that she was not entitled; for this reason she failed to prosecute her claim until she was better informed.

In assuming, for the sake of argument, that the ten years presumption would apply to a case like this, we wish not to be understood as affirming it to be so; for the mortgage was redeemed within a few years after the death of the husband, and it may be that would make a difference.

2. The administrator of the husband is a necessary party, and the defendant Wm. S. Campbell, the administrator in Louisiana, has not taken out letters of administration in this State.

The administrator is not a necessary party. The Act which gives dower in equities of redemption, prescribes no mode of proceeding; that is left to be done by the Courts according to legal analogies. In England, if one, prior to his marriage, makes a lease for years, or mortgage, dower is assigned to his wife, subject to the mortgage; and after it is assigned, the course is for the wife to file a bill against the mortgagee, and the personal representatives, and the heirs or devisees of the husband, to have the mortgage redeemed, so as to relieve the land assigned as dower from the incumbrance. This is done by requiring the personal representative to pay the mortgage debt, if there be assets, and there is no other fund made chargeable in relief of the personal estate, which is in general the primary fund for the payment of debts. For the want of personal assets, the widow is entitled to have the mortgage redeemed by the heir or devisee; she agreeing to keep down the interest upon one-third of the mortgage debt, during her life; or to redeem the mortgage herself, and take an assignment as a security for the principle and interest paid by her, minus the interest on one-third during her life. In this way she is let into immediate possession, and in enjoyment

of the land assigned to her. Here is a plain analogy, which it is said, in the case of *Thompson* v. *Thompson*, the Courts will adopt. So, in order to have dower assigned, no other party is necessary but the terre-tenant. There afterwards may be a necessity for other proceedings and other parties, unless, as has been the case here, the mortgage be redeemed without suit.

3. The defendant Murphy, relies upon the fact that he is a purchaser for valuable consideration without notice.

Where one has the legal title, and the equities are equal, the law prevails. But, unfortunately for this defendant, the plaintiff has not a mere equity. She has a *legal* right, which is *prior* to his, and there is no reason why she not assert it.

4. The plaintiff, by sleeping upon her rights, has not only induced the def't. to purchase at a full price, but to erect large buildings, at the cost of $22,000; and it is against conscience for her to claim dower in one-third of the lot, including his buildngs.

The consideration does not affect the plaintiff's right to have her dower, but it has an important bearing upon the extent of the relief to which she is entitled. It has this effect at law when the terre-tenant is a purchaser: "If the wife be entitled to have dower of three acres of marsh, every one of the value of twelve pence, the heir, by his industry and charge, maketh it good meadow, every acre of the value of ten shillings, the wife shall have her dower according to the improved value, and not according to the value as it was in her husband's life-time; for her title is to the quantity of the land, viz: one just third part. And the like law it is if the heir improve the value of the land by building. And, on the other side, if the value be impaired in the time of the heir, she shall be endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband." Co. Lit. 32 a, 32 b. Upon which is the following note from Lord Hale's MS., (n. 8): "If feoffee improve by buildings, yet dower shall be as it was in the seizin of the husband, (17 H. 3, Dower 192; 31. Ed. 1 Voucher 288,) for the heir is not bound to warrant, except according to the val-

ue as it was at the time of the feofment; and so, the wife would recover more against the feoffee than he could recover in value; which is not reasonable." This authority is decisive. It must be declared to be the opinion of the Court that the plaintiff is entitled to recover from the defendant Murphy, the interest upon one-third of the sum for which the lot was sold at the sale, made by the clerk and master mentioned in the pleadings, to wit, $4000, from the date of that sale up to the taking of the account; and also, interest upon such third part of the purchase-money, to be paid annually, up to the time of her death, for which the plaintiff will have a lien upon the premises as security, unless she elects to take the bond of the said Murphy, with approved sureties, in lieu thereof; or the plaintiff may elect to take a decree for such part of the purchase-money aforesaid, absolutely, with interest from the date of the sale, as is equal to the value of her life-estate in one-third part thereof; as to which there may be a reference. The plaintiff will, thereupon execute a release of her right to the defendant Murphy, and all claim for mesne profits during the time he has held possession.

5. The other defendants insist that the plaintiff is entitled to no part of the insurance money. This point is settled against them. *Graham* v. *Roberts*, 8 Ire. Eq. Rep. 100. "The money received on the policy of insurance stands in place of the buildings consumed by fire; the tenant for life is entitled to the interest thereon for life, in lieu of the use and occupation of the buildings, the interest to be paid annually." So, the plaintiff will be entitled to a decree against the defendant Wm. S. Campbell, who received the insurance money, for the interest upon one-third which has already accrued, and the interest upon such third as shall hereafter accrue during her life; the payment of which, annually, must be satisfactorily secured, unless the personal estate of the intestate, Marsden Campbell, was not sufficient to discharge the mortgage money, so that it became necessary to apply the insurance money, or some part thereof, to that purpose; as to which there must be a reference.

6. These defendants insist that they are not chargeable with the rent received by them for the house, from the death of the husband up to the time it was burnt.

There was no judgment for damages in a writ of right, or a writ of entry, or a writ of dower at common law, on the ground that the terre-tenant, during the time he was seized, had performed the feudal services. Damages were given against a disseisor by statute in an assise of *novel disseisin*; and damages are given to the widow by the statute of Merton in a writ of dower *unde nihil;* but it has been long settled that, in Equity, a widow is entitled to an account of the mesne profits, from the death of the husband up to the assignment of dower. Indeed this was one of the grounds upon which that Court assumed jurisdiction. See *Park* on Dower.

There must be an account of the mesne profits which were received by the defendants, or any of them.

PER CURIAM. Decree accordingly.

NEIL CAMPBELL *against* EDWIN O. CAMPBELL.

A parol agreement that B should reconvey to A one-half of a tract of land which A was conveying to him by a deed absolute upon its face, (no fraud, imposition or mistake, being alleged,) will not be upheld in a Court of Equity upon parol evidence alone of such agreement.

CAUSE removed to this Court from the Court of Equity of Sampson County.

On the 8th of Nov., 1847, the plaintiff executed to his son, the defendant, a deed for a tract of land, (describing it) supposed to contain three hundred acres, in consideration, as expressed in the deed, "of one thousand dollars, in hand paid, or secured to be paid." An action of ejectment was brought on this title, returnable at the Spring Term, 1853, of Sampson Superior Court.

The plaintiff alleges that he was in debt, and that he and the defendant agreed that the latter should pay off his debts and take a conveyance for one-half of the land above described; that the defendant proceeded, and did pay off several of the debts, but he then complained that he had no security for the money he was thus advancing; whereupon, to advance his son, and to encourage him in the payment of the debts as he had undertaken, he yielded to the persuasions of the defendant, and executed the above mentioned deed, but with an express understanding and agreement, that when the debts were paid off, one-half of this land was to be reconveyed to him; that the defendant paid little more of the debts, but let the land be sold for some of them, which he bought at sheriff's sale; that this sale was brought about by the plaintiff himself, in order to force the defendant to pay off the debts, "and it was expressly understood, and that the truth was" (as pl'ff. alleged) that the sheriff was only selling the one-half of the land, which plaintiff was to convey to defendant, and that by an oversight and misapprehension on his part, and a cunning device on the other, the defendant took a sheriff's deed for the whole land. Plaintiff alleges further, that he has often called upon the defendant to pay the rest of his debts and to reconvey one-half of the land to him, which he has heretofore failed and refused to do, but is prosecuting the action of ejectment against him, and as he has no legal title, plaintiff will be turned out of possession.

The prayer of the bill is for a conveyance of one-half of the land, and an injunction, also for general relief.

The defendant filed an answer denying the allegations relied on by the plaintiff.

There were replication to the answer, and proofs, which are sufficiently noticed in the opinion of the Court.

Strange, for the plaintiff.
Shepherd, for the defendant.

Battle, J. Among the allegations of his bill, there is a

statement by the plaintiff that he executed to the defendant, his son, a deed whereby he conveyed to him the whole of the land in controversy, upon an agreement between them that, upon payment by the son of certain debts, due from the father, the deed should be destroyed, and then the plaintiff should execute to the defendant, another deed, conveying one-half, only, of the same land. The plaintiff, admitting that the debts have been, in part, paid by the defendant, seeks a reconveyance of one-half the land, and that the defendant may be enjoined from prosecuting an action of ejectment which he had commenced for the purpose of turning him out of the possession of the land. The defendant denies the agreement, and insists that the deed was intended to be, what it is, an absolute conveyance in fee for the whole tract of land. The only evidence tending to prove the agreement, as insisted on by the plaintiff, is by parol; and the question is, whether a Court of Equity will, under such circumstances, give relief.

We cannot see any difference in principle between this case and the ordinary one of a bill for the specific performance of a parol contract for the purchase of land. The statute of frauds declares such a contract to be void; because its policy was to prevent the title of land from depending upon any other than evidence in writing. The plaintiff does not pretend, in the present case, that the deed was obtained from him by means of either fraud, accident, mistake, ignorance or undue advantage, but only that he "yielded to the persuasions of the defendant." Having knowingly and intentionally transferred the whole tract of land to his son, he is now endeavoring to get back one-half of it, upon parol proof of an agreement by his son to reconvey it. This would expose the title of the defendant's land to the danger of perjured or mistaken testimony. Why should it be allowed in this case more than any other? The mischief is the same, and we cannot imagine a sound reason for any distinction in the principle applicable to it. However much we may regret that we cannot give relief in this particular case, we are consoled by the reflection that, in denying it, we are upholding the policy of the

law, in the establishment of the salutary principle that men's titles to land shall not depend upon the "slippery memory of witnesses."

We have not noticed the alleged mistake in relation to the sheriff's deed; because, supposing it to be clearly proved, it does not aid the plaintiff in the relief upon the other part of the transaction.

The bill is dismissed, but without costs.

PER CURIAM. Bill dismissed.

SCHONWALD *against* SCHONWALD.

The three years residence, required by the Act of Assembly, ch. 29, sec. 7, Rev. Stat., of the petitioner in a suit for a divorce, previously to filing a petition, or bill, must be an actual residence, and when the wife sues, the legal maxim that "her domicil is that of her husband," will not avail in the stead of an actual residence.

THIS was an APPEAL from the Court of Equity of New-Hanover County, Judge CALDWELL presiding.

The bill was filed by the plaintiff, alleging adultery on the part of the husband, and an abandonment of his wife; and the prayer is for a divorce and dissolution of the bonds of matrimony, &c.

The main question in the case arises upon the following allegation in the plaintiff's bill: "And your petitioner further shows to your Honor, that her said husband has resided in the town of Wilmington for more than eight years, and although she has not been living with him three years, in all, in this State, yet she is advised that the domicil of her husband is her domicil, and, therefore, she has been resident of this State for more than the last three years preceding the present time." The defendant answered; replication taken; commissions and proofs.

The proper issues were made up and submitted to the jury;

amongst the rest was the following: "Has the plaintiff resided three years in this State, next before the filing of her said bill?"

On the trial of the issues, his Honor, amongst other instructions, told the jury that, according to admissions of the plaintiff, under oath, she had not resided in the State three years next before the filing of her bill, and no witness had been examined by her to prove an actual residence for three years, as required by the statute, though it was competent for her to have done so; that the position taken by her counsel that the domicil of the wife was the domicil of the husband, was, in many cases, a fiction that gave way to the fact; and, in this case, an actual residence of three years must be made to appear.

The counsel moved the Court to charge that the *onus* of proving the domicil of the plaintiff out of the State, under the circumstances of the case, devolved on the defendant; but the Court declined so to charge. The plaintiff excepted.

Verdict for the defendant. Judgment that the bill be dismissed. Appeal by the plaintiff.

W. A. Wright and *Strange*, for plaintiff.
London, for defendant.

Nash, C. J. The whole question turns upon the wording of the statute of this State upon "Divorces." Rev. Code, ch. 39, sec. 7. That section has this provision: "Nor shall any person be entitled to sue, unless he or she shall have resided within the State three years, *immediately* preceding the exhibition of the petition." This requirement is expressed in very plain terms, and it would appear needs no exposition. To reside at a place is to dwell there permanently, or for a time. In her petition, the plaintiff states explicitly, and in so many words, that she had not so resided in this State; "yet," she says, "she is advised that the domicil of her husband, is her domicil, and therefore, she has been a resident of this State for more than the three last years preceding the present time."

The counsel who drew the petition was well apprised of the difficulty in the way of his client, and, therefore, instead of recklessly making her swear to a fact, has made her aver a conclusion which does not necessarily follow the fact. It is true, that for many purposes, the domicil of the husband is the domicil of the wife; but it is not so for every purpose. The maxim that the domicil of the wife follows that of the husband, cannot be applied to oust the Court of its jurisdiction; neither, from parity of reason, can it give jurisdiction. 14 Pick. Rep. 181. If the construction contended for were to prevail, the policy of our act might, and would, be easily evaded. For instance, A and B are man and wife, residing in New York; the husband leaves his wife and comes to this State, where he lives for ten years in adultery with another woman; the wife, without ever being in North Carolina, files her bill here for a divorce, and claims to do so under the allegation that her husband has been domiciled here for ten years; could that be considered a compliance with the act? The principle reason of the enactment was to prevent our Courts from being made the easy instruments of obtaining divorces by persons not residing in the State—to prevent citizens of other States from using our Courts for purposes they could not attain in their own; in other words, to prevent frauds in these matters.

From the plaintiff's own showing, she was not entitled to file a bill in this State.

The Court, upon the trial of the issues, was requested to charge the jury upon the question of residence, that the *onus* of proving that the petitioner resided out of the State, lay on the defendant; this was rightly refused. Her residence in the State for the three years next preceding the filing of her petition, was a pre-requisite to her doing so. It is in the nature of a condition precedent. In the decree below there is no error.

PER CURIAM. Bill dismissed.

FRANCES A. DEBERRY *and otherrs against* HENRY W. IVEY.

An executor is not an insurer of the assets of the estate; so that if he acts in good faith and with reasonable diligence, he is not responsible for their loss.

Where assets had been collected by an attorney in a distant State, and lost by his insolvency, the said attorney being, in public estimation, altogether trustworthy at the time of such employment, the executor was *held* not liable for the loss.

Cause removed from the Court of Equity of Northampton County.

The bill is filed by the widow and next of kin of Henry Deberry, also by the same parties as legatees under the will of the said Henry, against the defendant, as his executor, praying an account of certain assets that came into his hands, or which ought to have come into his hands; and if not so, which were lost by his negligence, and for which he is accountable.

The defendant qualified as executor in December, 1844. In 1846, a petition was filed against him in the County Court of Northampton, in the name of the plaintiffs, with the exception of Mrs. Deberry, (who, nevertheless, sued in the capacity of guardian for some of the children,) praying an account and settlement of the estate of Henry Deberry, which was answered by defendant, an account ordered and stated, and being returned to Court was, on motion, affirmed, and decrees passed against the defendant in favor of the several parties plaintiff for their respective shares, and the money paid thereon.

But there had come into the hands of the defendant a bond on one John Drew Deberry, for $930,70, due on 8th of February, 1838, and another on George Spiers and Isaac Pipkin, for $550, due on 21st January, 1842, which had not been collected at that time, and which were not included in the account then taken, but which, the bill alleges, have either been collected since then, or might have been; and if not collected, the defendant has made himself liable to account for the same by his gross negligence.

The answer of the defendant admits that the two bonds

above stated, came to his hands as the executor of Henry Deberry; but he denies that the same have ever been collected by him, and says that although he has acted in good faith, and made diligent exertion to do so, he has not been able to make such collections. The defendant, in his answer, says that when these papers were received by him, George Spiers was insolvent, and had removed to parts unknown to the defendant. Pipkin, his surety, lived at Memphis, in Tennessee, and was solvent. John D. Deberry, the obligor on the other bond at that time, also resided in Tennessee, in the town of Jackson, and was believed to be in doubtful circumstances. Being advised by counsel, that he could not pursue these debtors, as executor, without making probate of the will and qualifying in Tennessee, under the same instruction and advice, he endorsed the said bonds to one Atlas J. Peebles, a proper person to entrust with such a charge, in order that suits might be brought, in his name, in that State, he being about to remove thither, and did so remove shortly afterwards. He states further that, by his advice, Mr. Peebles put the bonds in question into the hands of B. B. Blume, Esq., an attorney at law, who resided at Memphis, and who was represented to him as a lawyer, able, diligent, and of business habits, and a man of character and standing. He says that he had known Mr. Blume in North Carolina as a lawyer, and that his character was such as altogether entitled him to confidence, and that he knew no lawyer at Memphis but him. As a proof of his confidence in Mr. Blume, he shows that at the same time he entrusted him, for collection, with notes due himself to the amount of about $200. This was about February, 1845.

The answer further states that Mr. Blume brought suit against Pipkin, obtained judgment and collected the money in August, 1846; that Pipkin filed a bill in a Court of Chancery, and obtained an injunction restraining Blume from paying over the money to him, which was not dissolved until May, 1849; but the defendant was not advised of this dissolution until afterwards in 1852, when he went in person to Memphis; at which time, Blume had become insolvent, without his

ever having suspected that such an event was likely to occur.

He, further answering, states that Allen Deberry, of Tennessee, had become the surety of John D. Deberry, and in order to indemnify himself, had taken a conveyance of a tract of land, but had agreed to allow the said John D. a right of redemption for one year, on paying the sums for which he was liable. By an arrangement made by Mr. Blume, the said John D. had agreed to let the defendant have the right of redemption, in order to make good the debt due him, as executor; and he was applied to, to know whether he would sanction this arrangement, being informed, at the same time, that the land was worth more than the sums for which it had been thus pledged, and that this was the only chance to save any part of the debt. Under the advice of counsel, and with the approbation and consent of three of the plaintiffs, (the only ones who were adults,) he did advance the sum of $1585 for that purpose; that afterwards Mr. Blume sold this land for $2235, and received on the same $1106,44, which in 1847, was duly transmitted to him and paid over to plaintiffs. For the remainder of the purchase-money, he received notes, payable in one and two years.

He further says, that the sum which he thus advanced was allowed him in the settlement and decree made in the County Court of Northampton; that he subsequently discovered that Blume collected all this money for the land, as also the money coming to him individually, but that he was unable to obtain any of it from him except the sum above stated; that defendant went to Memphis in 1852, in person, when he found that Blume was utterly insolvent, and all he could do was to take his notes for the amount collected. He says, in the mean time, that he had frequently written to Blume about the business, and received encouraging letters as to the state of the business, and promising promptness and diligence in the management of the same.

Insisting that the money having been thus entirely lost, he submits that the loss should fall on the estate of the testator, and not on him.

There were replication to the answer, commissions and proofs, which are sufficiently noticed in the opinion of the Court.

The cause was set down for hearing on the bill, answer, exhibits and proofs, and sent to this Court by consent.

Moore, for plaintiffs.
Badger and *Barnes*, for defendant.

NASH, C. J. The bill charges that the defendant was duly qualified as the executor of the last will of Henry Deberry, and that the plaintiffs, under his will, are legatees; that the defendant, as such executor, among other things, took into his possession two bonds, one executed by John D. Deberry, for the sum of $930,70, the other by George Spiers and Isaac Pipkin, for $550; both of which bonds, it is alleged, were good, the obligors able to pay, and which were not collected, but lost to the estate through the negligence of the defendant.

The answer admits the taking into possession, by the defendant, as the executor of Henry Deberry, of the two bonds set out in the bill, and avers that the obligors were all insolvent, except Pipkin, the surety of Spiers, who, it is alleged, removed to parts unknown to the defendants; that John D. Deberry and Isaac Pipkin at the time the bonds came into his hands, resided in Tennessee, the former at Memphis, and the latter at Jackson. Soon after his qualification, he was advised by his counsel to endorse the bonds over to Mr. Atlas J. Peebles, then a citizen of this State, but who was about to remove to the State of Tennessee, as he, the defendant, could not sue in Tennessee without having the will proved there. This was done, and the bonds, by direction of the defendant, were placed, by Mr. Peebles, in the hands of Benjamin B. Blume, a practicing attorney of the Memphis bar. The defendant alleges that Mr. Blume was the only member of that bar with whom he was acquainted; that he had known him while a citizen of this State, settled in Northampton as a law-

yer; that he then bore the character of an able lawyer, and energetic collector, and an honest and upright man; but before entrusting the business to him, he made diligent enquiry as to his standing and character at Memphis, and found it to be the same as when he lived in this State; that the bonds were endorsed to Mr. Peebles, who handed them to Mr. Blume immediately on his arrival in Tennessee. Peebles left this State in February, 1845; suit was instituted against Pipkin, which was duly matured to judgment, and the money collected by Blume. Pipkin obtained an injunction to enjoin Blume from sending the money to the defendant, which was duly dissolved. As to the Drew Deberry bond, the defendant states, that Drew was indebted to Allen Deberry, and the latter, for the purpose of securing his debt, purchased the land of John D. Deberry, and by a provision in the contract, the debtor had a right to redeem at any time within twelve months, upon his debt being paid; that Mr. Blume took from J. D. Deberry an assignment of his right to redeem; and the defendant, by the advice of his counsel, and with the knowledge and assent of two of the plaintiffs, the only adults at that time, did redeem the land, which was afterwards sold by Mr. Blume, as his agent, part for cash, and the balance in two annual payments, secured by bonds, and carrying interest from the date. The cash payment, amounting to upwards of one thousand and one hundred dollars, was immediately remitted by Mr. Blume to the defendant. The answer further alleges that, soon after he had sent on to Mr. Blume the bonds he held, as executor, he sent on other bonds to him for collection, belonging to him individually, and that he has never received a cent upon them from Mr. Blume. The latter finally failed with a considerable portion of the money due the estate of the testator in his hands, which has been lost. The answer further states that he made several trips to Tennessee upon the business, and repeatedly wrote to Mr. Blume to hasten the collections, who always replied that he could collect the money, and would, immediately on doing so, remit it to him.

The answer is fully sustained by the proofs. Has the defendant been guilty of such negligence in the collection of the bonds in question as subjects him to the loss sustained? This is the sole question submitted. There is, indeed, no controversy about the facts. For what degree of negligence is an executor answerable? An executor, like other trustees, is not an insurer, nor to be held liable as such in taking care of the assets which come to his hands, nor in collecting them. He is answerable only for that *crassa negligentia*, or gross neglect, which evidences *mala fides*. The estates of deceased persons are deeply concerned in the existence of such a principle. If an executor was put into the position of an insurer—answerable for any neglect, however slight—unprotected by an honest endeavor to perform his duties, honest and responsible men would rarely be found willing to incur the responsibility; and those only would incur it who calculated the probable gain and loss. *Beall* v. *Darden*, 4 Ire. Eq. 76; *Freeman* v. *Cook*, 6 Ire. Eq. 373. When the bonds in question came into the hands of the defendant, the obligors had all left the State; John D. Deberry and Isaac Pipkin resided in Tennessee; one in Memphis, and the other in a neighboring county. John D. Deberry was in questionable circumstances, and George Spiers insolvent, and removed to parts unknown. It was the duty then of the defendant to make every prudent and reasonable effort to recover or secure the money due on the bonds. He was obliged either to go to Tennessee and take out letters testamentary there, or to employ an agent, properly authorised, to bring suit there. He pursued the advice of his counsel, and transferred the bonds, by an endorsement, to Mr. Peebles, who was well known to him, and who was about to remove to Tennessee. Early in the year 1845, the bonds were placed in the hands of Mr. Blume, a gentleman of high standing at the Memphis bar, and who had been recommended to him by gentlemen whose opinions were entitled to his confidence, and at that time, it appears, he was worthy of the trust. What more could the defendant have done towards the discharge of his duty? If

he had gone to Memphis in the first instance and taken out letters there, he would have been obliged to put the bonds in the hands of a lawyer, and trust in his vigilance and honesty in the transaction of the business. He could not remain there; that, the law did not require, and would have been attended with unnecessary expense to the estate. In this, then, there was no negligence of any kind. Was there any in the succeeding parts of the transaction? It is alleged that he suffered too long a time (three years) to elapse after the dissolution of the injunction obtained by Pipkin, before he took the necessary steps to collect the money from Blume. Let it be remembered that he had every reason to put confidence in Blume; and to his repeated letters, the answers were, that he was using every exertion to collect the monies due upon the different payments for the land, and that those payments were upon a credit of one and two years, and that, in the mean time, he had received a remittance from Blume, to an amount equal to that of both the bonds, as originally due upon them; and as to the Pipkin debt, Blume did not inform him of the dissolution of the injunction.

We are not enquiring whether the defendant might not, by greater diligence, have collected the full sum due the estate of Henry Deberry, but whether he has acted in good faith. Taking into view the distance at which he lived from Memphis, where the money was to be collected, the high character of Mr. Blume, as a lawyer and a man of business and integrity, the fact that the defendant had entrusted him with his own claims to collect, of which he has not received anything, and that he received no information that there was danger of Blume's breaking, until he had entirely failed, we have no hesitation in saying, not only that the defendant has not been guilty of gross neglect, but we are satisfied that, throughout the business, he has acted with good faith, and has used every degree of vigilance which the law required.

It was objected in the argument here, that there was no evidence in the case to show that Pipkin had enjoined Blume from sending the money collected out of him to the defendant.

The real existence of such a record is not the question before us, but whether the defendant had such evidence as should have satisfied a reasonably prudent man that such was the fact. The answer states that the defendant had received a copy of the bill, and had answered it, and the letters of Blume spoke of the suit, its progress and termination. The enquiry is not whether such a suit did exist, but whether the defendant had such proof as ought to have satisfied a reasonable man using ordinary diligence, that such was the fact. We think the circumstances stated did so authorise him.

The defendant has been guilty of no such negligence as ought to subject him to make good to the estate of his testator the amount of the bonds, or any part of them. We think he used the necessary diligence in their collection.

The defendant must hand over to the plaintiff the notes of Blume, mentioned in the pleadings; and the latter, upon receiving such notes, must execute to the defendant a release for the same. Each party must pay his own costs.

PER CURIAM. . . . . Decree accordingly.

J. W. LOWE, EX'R., *against* THOMAS CARTER AND WIFE *and others.*

Where a testator intending by his will to ratify and confirm parol gifts of slaves, long before made to two of his sons, by a mistake describes the slaves that had been given to the one son as those given to the other, and *vice versa*, the Court will declare the testator's intention to have been according to the dispositions by the parol gifts.

It is a general rule, that where the name or description of a legatee is erroneous, and there is a reasonable doubt as to the person intended to be named or described, the mistake will not disappoint the bequest. The same rule applies to the subject of the bequest.

Where, in construing a will, in order to carry out the intention of the testator, it becomes necessary to disregard the technical rules of grammar, the Court will do so.

The issue of a female slave, born after the making of a will, but before the death of the testator, does not pass simply by a bequest of the mother.

Where there is a direction in a will for certain funds to be paid into the clerk's office of a county court of another State, for the benefit of certain infants, and there is no such county court in that State, but there is a court of probate having charge of the estates of infants, the executor will be directed to pay into the office of the latter.

A bequest "that personal property belonging to my estate to be sold and the proceeds divided," &c., does not embrace the bonds, notes and accounts of the testator.

Where there are outstanding trusts to be performed by an executor, in respect of property bequeathed to one for life, and then over, it is the executor's duty to give a *special*, and not a *general*, assent, and he may require a bond from the life-tenant for the forth-coming of the property when the life-estate falls in.

Property directed to be sold, and "the proceeds of said sale to be equally divided between the bodily heirs of my three daughters," (naming them,) will be divided *per stirpes*.

Cause removed from the Court of Equity of Rockingham County.

This bill was filed by the plaintiff, as the surviving executor of the will of Yancy Holman, praying the opinion and direction of the Court, as to certain bequests in the said will.

The following clauses are set forth in the plaintiff's bill as those that require consideration in the questions propounded to the Court, viz:

Item 2d. I give and bequeath to Henry Newby, who married my daughter Nancy Holman, the sum of one dollar, and no more.

Item 3d. I give and bequeath to Daniel Bryant, who married my daughter Susannah Holman, the sum of one dollar, and no more.

Item 4th. I give and bequeath to Alexander Russell, who married my daughter Elizabeth Holman, one dollar, and no more.

Item 5th. I give and bequeath to the widow of my son Yancy Holman, one dollar, and nothing more.

Item 6th. I give and bequeath to my son Thornton Holman, the following negro slaves, to wit, Sylvia, and her four children, by name, Calvin, Bill, Alfred and Joshua, together

with her future increase; also one negro boy that I loaned him some years since, by the name of Henry, to him and his heirs absolutely forever.

Item 7th. I give and bequeath to my son Archer Holman, the following negro slaves, to wit, Lucy, and her four children, by name, Missouri, Jinny, Norman and Cicero, together with her future increase; also one negro boy, that I loaned him some years since, by the name of Jordan, to him and his heirs absolutely forever.

Item 8th. I loan to my daughter Sarah, wife of Thomas Carter, the following named negro slaves, that is, Peter, and his wife Mary, and their four children, viz., Ruth, Isabel, Frances and Elizabeth, and their increase; and at the death of the said Sarah Carter, then, the aforesaid slaves, with their increase, descends to the bodily heirs of the said Sarah Carter, to be equally divided between them, share and share alike, to them and their heirs forever.

Item 9th. I loan to my daughter Catharine, wife of William King, the following named negro slaves, viz., Pleasant, Bartlet, John, Violet, Charlotte and Martha, and their increase; and at the death of the said Catharine King, then the aforesaid slaves descends to the bodily heirs of the said Catharine King, to be equally divided between them, share and share alike, to them and their heirs absolutely forever.

Item 10th. It is my will and desire that the following negro slaves, to wit, Anderson, Isaac, Juliet, Perry, Friday, Larina and Elva, shall be hired out in this section of the country by my executors, hereinafter named, for the benefit and use of the children of my daughter Elizabeth Russell, who married Alexander Russell, until the youngest of the said children shall arrive at the age of twenty-two years; and that my said grand-children shall and may receive, from time to time, the proceeds of the hire of the said slaves, as it may fall due and come into the hands of my said executors, and by them forwarded to the clerk's office of Lauderdale County, Alabama; and by the County Court of said County, to be distributed equally between all the children of the said Elizabeth Russell,

according to the discretion of the said Court, for the purpose of their better maintenance and education; and when the youngest of my said grand-children shall arrive to the age of twenty-two years, then it is my will and desire that the said slaves shall be equally divided between all my said grand-children, share and share alike, to them and their heirs absolutely forever.

Item 11th. It is my will and desire that the slave Harriet, and her child Cina, be sold, as it is her request, to the highest bidder.

Item 12th. It is my will and desire that my tract of land lying and being in the County of Rockingham, on the water of Little Rockhouse Creek, containing 346 acres, adjoining the lands of Reuben Johnson, &c., be sold to the highest bidder, and the proceeds of said land be equally divided between my three grand-children, viz., Yancy Carter, son of my daughter Sarah Carter, Yancy King, son of my daughter Catharine King, and Yancy Russel, son of my daughter Elizabeth Russell.

Item 13th. It is my desire that the personal property belonging to my estate shall be sold, and the proceeds of the said sale be equally divided between the bodily heirs of my three daughters, viz., Elizabeth Russell, Sarah Carter and Catharine King."

The tract of land on Rockhouse Creek was sold, and the money distributed as directed. The executor made sale of the entire personal property, besides the slaves, as directed by the 13th item of the will, amounting to $805, and also sold Harriet and her child Cina, as directed by the 11th item, for $1000. The slaves mentioned in the 10th item were hired out as therein directed.

Of the slaves loaned to Sarah Carter, as mentioned in the 8th item, one of them, Mary, was delivered of a female child, between the date of the will and the death of the testator. This child is named Nancy. The plaintiff asks the instruction of the Court whether this girl Nancy is included in the legacy to Sarah Carter, or whether the same is undisposed of

by the testator's will; and whether, if not included in that legacy, this slave is to be sold under the 13th item of the will, and the proceeds divided among the children of Elizabeth Russell, Sarah Carter and Catharine King, or among all of the next of kin of the testator.

The advice of the Court is also asked as to the mode of distributing the fund raised under the 13th item; whether the children of Sarah Carter, Catharine King and Elizabeth Russell, are to take this fund *per stirpes* or *per capita;* and whether the division may be made in the life-time of the mothers, or must be postponed until their deaths.

Besides the personal property which came into the hands of the executor, there were received by him bonds and accounts to considerable amount; and he submits whether the money raised from these sources shall be distributed under the said 13th item, among the children of the three daughters, or to the entire next of kin.

He asks also to be informed as to the nature of his duties in the mode of disposing of the hires of the slaves, for the benefit of Mrs Russell's children in Alabama. The nature of this enquiry is clearly stated in the opinion of the Court upon this point.

He also asks the instruction of the Court as to his duty in assenting to the legacies to Mrs. Carter and Mrs. King, under the 8th and 9th items of the will; whether they take the absolute property in the slaves mentioned in these items, thus making it proper to assent without qualification, or whether there be a limitation over to their children, and if so, in what manner he is to assent to the life-interest of the mothers.

Some years before the death of the testator, he made a parol gift, and delivered to his son Thornton the slaves Lucy and her four children, Missouri, Jinny, Norman and Cicero, and Jordan. Thornton took these slaves to Georgia, where he resides, and where he still has them. Some years before his death, the testator also gave, by parol, and delivered to his son Archer, the slaves Sylvia and her four children, Calvin, Bill, Alfred and Joshua, also Henry, who took them to Mis-

sissippi and sold them. Afterwards, in the life-time of the testator, Archer Holman died without leaving children. By reference to the 6th and 7th items of the will, it will be seen that the slaves given formerly to Thornton are bequeathed to Archer, and *vice versa*, those heretofore given to Archer are bequeathed to Thornton, which, the executor believes, was a mistake in the testator; the name of Thornton being used in the 6th item where it was intended Archer's name should be used; and the name of Archer being used in the 7th item, where it was intended that Thornton's name should be; and he believes that the mistake was that of the draftsman; but he asks the advice of the Court in relation to these bequests; whether he is to treat them literally, as written in the will, or whether the Court will authorise him to pursue what he believes was the testator's intention in the premises. Also, whether the bequest to Archer failed by his death in the life-time of the testator.

Answers were filed by Thomas Carter and wife, and by the guardian of the infant next of kin, and judgments pro confesso were entered as to all the rest of the next of kin, they having been made parties to the bill. Replication to the answers.

The cause was set down for hearing on the bill, answers, former orders and exhibit, and sent to this Court by consent.

Fowle, for plaintiff.
Morehead, for defendants.

Nash, C. J. The bill is filed by an executor to procure from the Court a construction of the will of Yancy Holman.

We shall take up the items of the will in the order in which they were so lucidly arranged by the counsel of the plaintiff.

The 6th and 7th items of the will are so connected by the facts, that it is necessary to consider them together. We do not entirely concur in the view taken by the plaintiff's counsel as to these items. The authorities cited by him, to wit, Adams' Eq. 172; *Yates* v. *Cole* and others, 1 Jones' Eq. 110,

sustain his argument, that the names of Thornton and Archer cannot be transferred from the respective items in which they are used, each to the other. There is, upon the face of this will no ambiguity; but there is an ambiguity arising out of extrinsic facts, and therefore, parol evidence is allowed to explain it. Yancy Holman, the testator, had, some years before the making of his will, given by parol to his son Thornton Holman, the negro woman Lucy and her four children, Missouri, Jinny, Norman, and Cicero; and to his son Archer, he had given, in the same way, the negro woman Sylvia and her four children, Calvin, Bill, Alfred and Joshua. In his will he just reversed them, bequeathing to Thornton the negroes formerly given to Archer, and to the latter the negroes formerly given to Thornton. When these facts are known, (and they are admitted,) it is at once manifest, that a mistake was committed in the names of the respective legatees, or in the names of the negroes, as given by the will. No reason has been assigned, nor can we imagine one, for this change of names in the will. If the will is to receive a literal construction, Thornton loses the slaves originally given to him, and gets nothing by bequest, for he gets nothing by the 12th and 13th items of the will; the proceeds of the sale of the slaves therein mentioned, being given specially to other legatees. Now, it is evident, it was not the intention of the testator thus to exclude Thornton from all interest in his estate, and we think there is enough on the face of the bequests to Thornton and Archer, to show that it was the intention of the testator to confirm to them his previous gifts. It is a general rule, that where the *name* or description of a legatee is erroneous, and there is reasonable doubt as to the person intended to be named or described, the mistake will not disappoint the bequest. The error may be rectified, and the true intent ascertained in two ways: 1st, by the context; and in some cases by parol testimony; thus, an error in the name of the legatee, may be obviated by the accessary of his description; as where a legacy is given "to my name-sake Thomas, second son of my brother," and the brother had no son named "Tho-

mas," but his second son is named William, the latter will take. Williams on Ex'rs. 736. In the construction of a will, the Court may enquire into every material fact relating to the person claiming an interest under the will. Both the 6th and 7th items close in the same way, by a reference to previous gifts of slaves both to Thornton and Archer. It is true, that in grammatical construction, a relative is always applied to the next antecedent, and in these bequests the relative "that," according to the rule, would apply to the negroes Henry and Jordan; but the Court, to carry out the obvious intentions of a testator, will, where necessary, disregard the technical rules of grammar, and give the relative a more distant antecedent. Williams on Ex'rs. 715. In this case, we consider the relative as referring, not only to the negroes Henry and Jordan, but to the previous provisions of the item as coupled with the slaves previously mentioned. This construction is the true one. Apply this principle to the bequests in question: the slaves are designated by two descriptions; one, the names of the slaves; the other, an act of notoriety performed by the testator some time before, to wit, the previous gifts. We have seen, that if a legatee receives in a will two descriptions, the one, most certainly and accurately designating the individual, will govern the construction. So, in the subject of the bequests. In this case, the subjects of the bequests are designated in two ways. Which shall we take as most indicative of the testator's intention? The one, certainly, the least liable to mistake. The testator might have forgotten which family of negroes he had given to Thornton, and which to Archer, but he could not have forgotten the facts of the previous gifts. We consider the previous gifts, as facts much more to be relied on than the names of the negroes; and that in the 6th item, it was the intention of the testator, to confirm the previous gifts made to Thornton and Archer; and that the former is entitled to hold, under the will, the slaves Lucy and her four children, Missouri, Jinny, Norman and Cicero. The bill states, that Archer Holman carried the negroes, given by the previous gift to him, to Mis-

sissippi, and there sold them, and died before the testator. The bequest to him is a satisfaction of the previous gift.

Mrs. Carter does not take a life-estate in Nancy, the offspring of Mary. She was born after the making of the will, and before the death of the testator. The word *increase*, is not coupled with *future*, she, therefore, did not pass to Mrs. Carter with her mother and the other children, but is included in the 13th item, and is to be sold. *Cole* v. *Cole*, 1 Ire. Rep. 460; *Joiner* v. *Joiner*, 2 Jones' Eq. 68. Nor did she pass to the children of Mrs. Carter under the terms "bodily heirs." The rule in Shelly's case has no application. *Allen* v. *Pass*, 4 Dev. and Bat. 77.

The 10th clause directs certain slaves, whose names are mentioned, "to be hired out in that neighborhood, until the youngest child of the testator's daughter Elizabeth Russell, arrives at age; and the hires in the mean time, as received by the executor, to be forwarded to the clerk's office of Lauderdale county, Alabama, and by the county court of said county, to be distributed equally between all the children of the said Elizabeth Russell, &c." Mrs. Russell and her children, we presume, lived in Lauderdale county, Alabama, and the distribution is to be made there. There are in Alabama no county courts, but they have, what is called a probate court, discharging some of the functions of our Courts of Pleas and Quarter Sessions; they have the appointment of guardians to infants, and a general superintendence over their estates. To this Court then, it is the duty of the executor to remit the hires of these negroes, and in so doing, he may pay the hires to a duly appointed agent of the court of probate, or may employ an agent of his own for that purpose.

The 13th item embraces the proceeds of the sale of the personal property, already made, to wit, $805, the proceeds of the sale of Harriet and her child Cina, the proceeds of the sale of Nancy and all the choses in possession not otherwise disposed of. This clause does not embrace the bonds, notes and open accounts, and money on hand at the time of the testator's death, for the reason that the testator directs a sale of

the property embraced in it. They must be distributed under the statute of distributions, as they are not disposed of by the will. *Pippin* v. *Ellison*, 12 Ire. Rep. 61.

The children of Elizabeth Russell, Sarah Carter and Catharine King, take *per stirpes* and not *per capita;* that is, the children of each of the sisters take the place of their parent. *Davidson* v. *Dallas*, 14 Ves. Rep. 576, 2 Fearne 92; *Hill* v. *Spruill*, 4 Ire. Eq. 244.

Finally, the executor may distribute among the children as soon as he pleases, and need not wait for the deaths of their mothers. They have no interest in the matter.

The executor has asked our direction as to his assent to the legacies. An unqualified assent by an executor to a bequest for life, vests the title in remainder. Where, however, there are outstanding debts or trusts to be performed by the executor, he has a right to give a special, and not a general, assent, and ought, in the latter case, to insist that an inventory of the property be filed by the life-tenant, and also take a bond, with sureties, for the forth-coming of the property when the life-estate falls in. Iredell's Ex'r. 257; *Saunders* v. *Gatlin*, 1 Dev. and Bat. Eq. 86; *Cheshire* v. *Cheshire*, 2 Dev. and Bat. Rep. 254.

Per Curiam. Declare accordingly.

MATHEW WILDER AND OTHERS *against* JACOB STRICKLAND.

Where the erection of a public mill is demanded by the necessities and convenience of the public, and will materially conduce to the advantage of the owner of the mill-seat, the possible result of some small and uncertain injuries to two of the adjacent proprietors of land, by overflowing it, and slightly affecting the health of their families, was not deemed by the Court a sufficient ground to interfere by injunction to prevent the work, especially as those proprietors would have a remedy at law if their fears should be realised.

This was a bill for an injunction to prevent the defendant from building a mill on Tar River, transmitted from the Court of Equity of Nash County.

The bill was originally filed as an information in the name of the Attorney General, on the relation of the plaintiffs, and as a bill of complaint; but subsequently was dismissed as to the Attorney General, and is carried on in its other aspect.

The plaintiffs allege in their bill, that they each own and reside upon lands lying on the Tar River, in the County of Nash, and have been so residing for many years past; that the defendant, Jacob Strickland, has commenced erecting a grist and saw-mill on that river, about a mile below the residences of the plaintiffs, and was just about commencing to build a dam across the river, which would pond the water back upon the plaintiffs, and, as they believed, would cause much damage to their lands by overflowing them, and by saturating them with water, so as to render them unfit for cultivation; that the pond of water thus raised would, as they believed, destroy the health of their families, impair the values of their estates, and finally compel them to remove. They further allege that there is no necessity for the proposed mill; that there is already a very good one a short distance off, and that this structure is not desired by the neighborhood; so far from that, they say the community there are *strongly opposed* to its erection. The prayer of the bill is for an injunction to restrain the building of the proposed mill. The injunction had issued by an order of the Judge at chambers, and has been since pending. There was a prayer also for general relief.

The answer of the defendant denied the allegations as to injuries to the lands of the plaintiffs, and the health of their families, and denied that the neighboring community was opposed to the proposed work; asserting its great necessity and convenience to the public, and that it was greatly desired by the neighbors. The answer also stated that the proposed mill was intended as a substitute for an old one which defendant owned on another stream, about a quarter of a mile off, which was very insufficient and unsatisfactory to the public, and

much more injurious to the health of the community than the intended mill could possibly prove, and which it was his intention to pull down as soon as the new one was finished.

There were replication to the answer, commissions and proofs, and the cause being set down for hearing was sent to this Court by consent.

Miller and *Cantwell*, for plaintiffs.
Moore, for defendant.

Nash, C. J. The bill is filed to enjoin the defendant from erecting a mill, upon the allegation that it will cause much damage to the lands of the plaintiffs by rendering them of no value for cultivation where they are cleared, and destoying the timber and other growth where they are not cleared, and they fear will destroy the health of their families. The defendant admits he is about to erect a public mill at the place designated; that the site is a very favorable one for such an establishment. He denies that it will overflow or render sobby and unfit for cultivation any part of the lands of the plaintiffs, and denies that it will render the families in the neighborhood unhealthy. The plaintiffs further allege that a large majority of the neighbors are against the erection of the mill. This is denied by the defendant. The answer further states that the defendant is the owner of a mill on Turkey Creek, which is not more than a half a mile from his new site, and which has a more extensive pond than the contemplated mill will have; and that it is the opinion of a number of the neighbors that the pulling down of the old mill, which the defendant intends to do, as soon as the new one is erected, and the erection of a new one, will be more useful to the neighborhood, and less injurious to the health of it, than the old one.

The controversy is a matter of evidence. To the testimony then. Does the plaintiffs' proof sustain their bill? Many depositions have been taken on both sides. We will examine the testimony of the plaintiffs first.

H. H. Bryant testifies that the old mill is a wet-weather

mill, and that, in the summer months, it cannot make flour, or saw.

Dr. Drake is of opinion that the breaking up of the old mill will prove beneficial to the health of the neighborhood.

Dr. Matthews knows the river, and, judging by his eye, thinks a six-foot dam would so raise the water in the river, as to prevent the plaintiff Wilder, from clearing a valuable piece of land, containing forty or fifty acres, and would *likely* produce disease in his family.

Mr. Morgan never leveled the ground, but, judging by his eye, thinks a six-foot dam would back the water up two or three branches on Wilder's land, so as *probably* to overflow some of the low places, covering how much land he does not know; and that the pond *might* injure the health of Wilder's family; and that it is difficult, at times, to get meal from the old mill.

Mr. Cone agrees with Mr. Morgan as to the overflowing of the low places in the guts and branches, and as to getting meal; there was a difficulty at times, at the old mill, and he thinks a new mill is necessary to supply the neighborhood.

Doctor Mann thinks it probable, that in the year 1846, the families of Williams and Strickland, were made sickly by the old pond. He further states, that the old mill cannot supply the neighborhood, and the proposed mill, on the river, is *necessary*, and will prove a great convenience to the neighbors, there not being a constantly grinding mill for about eighteen miles above it.

Mr. Taylor, does not think a six-foot dam will pond the water back on the lands of the plaintiffs.

James Strickland, son of the plaintiff Zadock Strickland, and son-in-law to the plaintiff Wilder, thinks a six-foot dam would throw the water up the guts and ravines, and effectually prevent the draining of portions of the low grounds of Wilder and Strickland, and thinks it would injure the health of their families. Has never known a dam across Tar river to produce sickness.

Reddin Strickland, another son of plaintiff Strickland,

thinks as his brother does as to the river dam's producing sickness in the families of his father and Wilder, and that it would injure about fifty acres of the land of each.

Condary O. Strickland, another son of the plaintiff Strickland, agrees with his brothers as to the probable effect of the dam upon the health of the families of Wilder and his father, and thinks about eight or ten acres of the land of both Wilder and his father would be covered by the water.

William Wilder, a relative, thinks the dam would sob a great deal of the land of the plaintiffs, but does not think it would cover any.

This is the evidence of the plaintiffs. Does it sustain the allegations of their bill? We think it does not. It is true that the river-dam may, and no doubt will, pond the water back into the guts and ravines on the lands of the plaintiffs, to the extent of eight or ten acres on each, as stated by C. O. Strickland; but the last witness, Wm. Wilder, and the witness Taylor, do not think it will cover any of their land. The first allegation of the bill is not sustained. As to the second, relating to the effect of the river-dam upon the health of the neighborhood, the physicians who were examined testified as to the origin and effect of malaria in producing disease. None of them, however, testified that the river-dam would produce disease. It might or it might not. Even the sons of the plaintiff Strickland do not say it *will*, but they think it will. This allegation is not sustained.

As to the allegation that the neighbors are in general opposed to the erection of the proposed mill, there is no evidence on the part of the plaintiffs; but there is, from his own witnesses, sufficient evidence to show that the mill contemplated by the defendant is required, not only by the convenience of the neighborhood, but by their necessities. The old mill is a wet-weather mill, and it is often impossible in the summer-time to get even meal from it, and it cannot, at those times make flour, or saw. Every one who depends upon a wet-weather mill knows the inconvenience to which they are often exposed in sending to a distant river-mill. In this case, Dr. Mann,

a witness of the plaintiffs, states that the contemplated mill is required, not only by the necessities of the neighborhood, but by its convenience, as there is no mill on the river above it, for upwards of eighteen miles.

Considering the proofs offered by the plaintiffs as not sustaining the allegations of the bill, we have not brought forward, in detail, the proofs of the defendant. They, however, fully sustain the defence, that the contemplated mill will neither injure the health of the families of the plaintiffs, nor cause such an injury to their lands, as will justify the Court in denying to the neighborhood the convenience of a public mill which will grind all the year. His proofs also show that if the river-mill shall prove injurious to the health of the families of the plaintiffs, it will not be as much so as is the old pond which he intends to dispense with as soon as the new mill is erected. If upon such evidence as is offered by the plaintiffs, the courts will interfere to restrain the building of a mill, it must be built in a wilderness where there is no one to be injured, either in health or property; for it must needs be, that in a thickly settled neighborhood, some one must be injured in one way or the other. We are satisfied, too, from the testimony of the defendant, that not only is such a mill required by the necessities and convenience of the neighborhood, but a very large portion of it desires its erection. It is not every slight or doubtful injury, that will justify the Court in exerting their extraordinary power of injunction in restraining a man from using his property as his interest may demand, when the benefit of such user is mutual to the public and to the owner.

Should the fears, real or assumed, of the plaintiffs, as to the effects of the proposed mill upon the health of their respective families be realised, they will not be without redress. The courts of law will be open to them, and they will go into them with more grace, having by these proceedings put the defendant on his guard.

Per Curiam. Bill dismissed with costs.

ELIZABETH COBLE *against* JOHN COBLE.

To entitle the wife to divorce *a mensa et thoro*, it is not necessary that the indignities complained of as rendering her condition intolerable and her life burdensome, should be a striking, or even touching of, the body, but foul and injurious accusations often repeated, with a withdrawal of all intercourse, refusing to bed with his wife, and a denial that she is his wife, with threats against her life, are sufficient indignities to entitle the wife to this relief.

PETITION for divorce, from the Court of Equity of Alamance County.

The petition alleges that plaintiff and defendant intermarried about twenty-four years ago; that some four years after the marriage, the defendant, being of a jealous temperament, charged plaintiff with infidelity to him, which was untrue; that she endeavored by kindness to eradicate this jealousy from his mind, and for some time thought she had done so, but that in 1852, it appeared anew; about that time, the defendant, upon the most frivolous and groundless pretences, began to accuse her of an improper intimacy with one Dr. ——, a young man who had lived for two years with defendant and the petitioner; that he perpetually harrassed her with these painful accusations, and manifested by his language and conduct, contempt and hatred towards her; that the young man spoken of left the house, but his absence wrought no change whatever in defendant's conduct; that he continued his cruel treatment; refused to recognise her as his wife and to bed with her, and withdrew himself from her society; that her friends, sympathising with her, endeavored to bring about a reconciliation, but he repelled all approaches of this sort; and, on one occasion, told her father, who was thus interposing in her behalf, that "he had lead in his gun, and would have satisfaction;" that, thus finding her life with the defendant intolerable and burdensome, and apprehensive of personal violence, she left his house, and has since resided with her father and friends, and has been maintained and supported by their kindness; that defendant refuses all offers on the part of the plaintiff to return to his house or to make any provision for

her. When applied to to that effect, his answer was that he would give her nothing except what she could get by law.

The petition sets forth that, just before filing the petition, she went to defendant's house with two of her friends, whom she procured to intercede with him, but he again refused to live with her; that she had carried some clothing with her, and placed it in one of the rooms of the house, from which defendant had it removed, and locked the room, and the other rooms of the house, and left home.

The plaintiff alleges that the defendant is selling off his property, and preparing to remove out of the State.

The prayer of the bill is for a divorce from bed and board, and for alimony; and for a writ to restrain the defendant from removing his property beyond the jurisdiction of the State; also for general relief.

The defendant filed a general demurrer, and the cause being set down for argument on the demurrer, was sent to this Court by consent.

Norwood, for plaintiff.

No counsel for defendant.

Battle, J. The bill is filed for the purpose of obtaining a divorce, *a mensa et thoro*, and also for alimony, under the 3rd section of the 39th chapter of the Rev. Stat. The defendant has put in a general demurrer, which must be overruled if there be any part of the bill upon which the plaintiff is entitled to relief. Adams' Eq. 335; 1 Dan. Chan. Prac. 538, 540. *Earp* v. *Earp*, 1 Jones' Eq. Rep. 239.

The third section of the act referred to specifies several distinct things, the doing of either of which by a husband will entitle his wife to a partial divorce, and to alimony. If he "shall abandon his family, *or* maliciously turn his wife out of doors, *or* by cruel and barbarous treatment endanger her life, *or* offer such indignities to her person as to render her condition intolerable, or her life burdensome," the law declares that he has so far forfeited his marital rights, that his

wife may, if she desires it, have a separate bed and board, and claim a separate maintenance out of his estate. In order to obtain this, the 5th section of the same act provides, that she must exhibit a petition or bill either in a Superior Court of Law, or a Court of Equity, in which she must set forth "particularly and specially the causes of complaint," which, according to another section, must have existed six months prior to the filing of her petition or bill. The 8th section of the corresponding chapter of the Revised Code, dispenses with the six months prior existence of the causes of complaint, when the husband is removing, or about to remove, his effects from the State; but as the bill in this case was filed before that Code went into operation, it is governed by the provisions of the Revised Statutes.

We have now to enquire whether the plaintiff has, in her bill, set forth sufficient causes of complaint to entitle her to relief under either clause of the act. She charges that her husband, upon the most frivolous and groundless pretences, accused her of a criminal intimacy with a young physician who boarded in the family, and manifested, by his language and conduct, contempt and hatred for her; that the young gentleman left their house, but his absence produced no favorable change in the demeanor of her husband towards her; that he declared she was no longer his wife, and refused to sleep in the same bed with her; that her friends attempted to interpose and bring about a better state of feeling and conduct on the part of her husband towards her; that he was inexorable, positively and cruelly rejecting every proposal for a reconciliation, and, on one occasion, said to her father, who was endeavoring to interpose his good offices, that "he had lead in his gun, and would have satisfaction." She then states that, finding her life with her husband burdensome and intolerable, she had left him and gone to live with her father and friends, by whose bounty and kindness she had since been supported and maintained; that she had offered to return to her husband, but he had rejected all her advances; and that, on a recent occasion, she had gone, in company with two of

her friends, to his house, with some of her clothes, and put them in a room, and that he had caused them to be removed, locked the house and left home. This latter circumstance we cannot take into consideration, because it occurred less than six months before the filing of the bill. That, however, is not of much consequence, as we are satisfied that the other allegations are abundantly sufficient to bring her case within the operation of the clause which entitles her to relief for such indignities offered to her person, as to render her condition intolerable, or life burdensome. What is an indignity to the person? "Indignity" is defined by Mr. Webster to be, "unmerited, contemptuous conduct towards another; any action towards another which manifests contempt for him; contumely; incivility, or injury accompanied with insult." It is manifest from this definition, that an indignity to the person may be offered without striking the body, or even touching it in a rude and offensive manner. Contumelious words, especially when accompanied with a contemptuous demeanor towards a person, may amount to an indignity which would be felt by a sensitive mind with far keener anguish than would be inflicted by a blow. And what, to a virtuous woman, can be more contumelious than a charge made by her husband of infidelity to her marriage vow? What greater incivility or injury than his refusal to recognise her as his wife, and his rejection of her from his bed? What greater manifestation of hatred and contempt than to threaten her with deadly violence? We are satisfied that an indignity to her person may be offered without any unlawful interference with her body, which, indeed seems to be provided against by the clause which protects her from such "cruel and barbarous treatment as may endanger her life." We are satisfied further, that those allegations of the bill, upon which we have commented, fully make out the charge of offering such indignities to her person as to make her condition intolerable, or her life burdensome; if, indeed, they do not make out another charge of maliciously turning her out of doors. Upon the latter, though,

it is unnecessary for us to express an opinion, as the former is sufficient to entitle her to all the relief which she seeks.

The demurrer must be over-ruled, with costs, and the defendant ordered to answer; and to that end the cause must be remanded to the Court from which it was sent.

PER CURIAM. Decree accordingly.

THE STATE *to the use of the Public Treasurer against* WM. D. PETWAY.

The Act of 1854, (Rev. Code, ch. 99, sec. 20,) imposing a tax on the dividends of individual holders of bank-stock, is not unconstitutional.

CAUSE removed from the Court of Equity of Edgecombe County.

The bill alleges, the incorporation of the Commercial Bank of Wilmington, its organization, the subscription by the defendant for fifty shares of the capital stock, the declaration of dividends by the bank of six per cent. in favor of the stockholders at one time, to wit, in August, 1854, and five per cent. in their favor at another time, to wit, in February, 1855, making the sum of $550, which was duly paid to the defendant on his fifty shares, previously to the first day of April, 1855; and that by virtue of the Act of Assembly passed in the year 1854, concerning the Revenue, the defendant is liable to pay on account of the said dividends, a tax of three cents on every dollar of the same; but that the same has not been paid, nor listed to be paid, and plaintiff is informed that the defendant denies the plaintiff's right to collect the same.

The prayer of the bill is, that the defendant may answer and discover the number of shares owned by him in the said bank; the amount of dividends received by him within the year next preceding the 1st of April, 1855, and not before that time listed by him for taxation, and for a decree that defendant pay, &c.

The defendant filed a general demurrer. Joinder in demurrer.

The cause was set down for argument on the bill and demurrer, and sent to this Court by consent.

Attorney General, for the plaintiff.

Moore, for the defendant, argued as follows:

The question arises under the Act of 1846, ch. 4, sec. 12, p. 17, which provides that "the president or cashier, shall pay into the treasury of the State, 25 cents on each share of capital stock subscribed and paid for; and the first payment of the tax shall be made 12 months after the bank shall have commenced operations;" and sec. 20, ch. 99, Revised Code, which imposes a tax of three cents on the dollar, of all bank-dividends.

The question is: "Was it within the constitutional competency of the Legislature to impose a tax on the dividends of the bank?"

It is contended by the defendant, that the tax imposed by the charter exempts the bank and the stockholders from any additional tax; not in words, but by a fair interpretation of the charter, according to the understanding of the parties in the offer and acceptance of the charter.

It may be useful to our purpose to look at similar provisions in the several charters of our banks, and other corporations.

In the renewed charter of the C. F. Bank of 1833, 2 R. S., s. 11, p. 50, the provision is "a tax of twenty-five cents on each share of stock owned by individuals in the bank, shall be annually paid into the treasury of the State," &c.; "*and the said bank shall not be liable to any further tax.*"

The provision in the Bank of the State of North Carolina, of the same year, 2 R. S., s. 13, p. 61, is, "each share owned by individuals shall be subject to an annual tax of twenty-five cents, *and no more*, which shall be reserved out of the profits as they accrue," &c. The Fayetteville Bank, chartered in 1848, is taxed in the same language as the Commercial Bank, so is the Bank of Washington, chartered in 1850, the Bank of

Yanceyville, chartered in 1852, the Bank of Charlotte, in 1852, and the Farmer's Bank, in the same year.

The property of such a corporation and the members has, by refinement, been divided into several species. 1. The franchise, or privilege of association for a common purpose. 2. The stock of the corporation. 3. The shares of the members. 4. The dividends. And a tax, it may be, on one, is not by *necessary implication*, a tax on any other. And so, it may be held that the *dividends* under the C. F. charter were not exempted from taxation; and that all the security against further imposition in the charter of the Bank of the State, is confined to the shares of individuals, and that the three other properties are exposed, without limit, to the legislative will.

By the charter of the W. and Raleigh Rail-road Co., 2 R. S., p. 342, s. 19. The property of the company, and shares therein, "are exempt from taxation." Literally construed, the charter exposes to tax the dividend and franchise.

The charter of the Raleigh and G. Railroad Co.; 1850, p. 254, s. 8, exempts from taxation the *railroad*, *engines*, *cars* and *profits*, for fifteen years. By this mode of interpretation, the *franchise and shares* are exposed to taxation.

The history of the times, as to the Railroads, forbids this construction. At this day all will admit that the faith of the State, as understood to be pledged at the time, would be grossly violated by an impost on the franchise or dividends of either corporation.

In the construction of charters, the position is not unfrequently met with, that *in grants by the public, nothing passes by implication. Charles' River Bridge* v. *Warren Bridge*, 11 Peters' R. 420. Nothing "is surrendered unless the intention to surrender is manifested by words too plain to be mistaken." *Ohio Life Ins. and Tr. Co.* v. *Debolt*, 16 How. 435. (per TANEY.)

It is submitted that a more reasonable and just rule is laid down in *U. States* v. *Arredondo*, 6 Peters' R. 740. "The words of a grant are always construed according to the intention of the parties as manifested in the grant by its terms, or by the

reasonable and necessary implication to be deduced from the situation of the parties, and of the thing granted, its nature and use." This was said of a grant by the public. The Constitution of the United States is a grant by sovereigns. This ought to be "construed according to the sense of the terms, and the intention of the parties." When there is doubt or ambiguity arising from the words, or from other sources, interpretation has its proper place. "There may be obscurity, as to the meaning, from the doubtful character of the words used, or from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived from the whole structure of the instrument, or its avowed object. In all such cases interpretation becomes indispensable." 1 Story on Constitution, ss. 400, 401, et seq.

Now, where it is provided, as in the charter of the Cape Fear Bank, that a tax of 25 cents shall be laid on the share, and that "*the bank shall not be liable for any further tax;*" and, as in the charter of the Bank of the State, that "the share shall be taxed 25 cents and *no more*;" of what efficacy can these restrictions be, if the other properties of the bank and the members, may be taxed *ad libitum*? The restriction is valueless; yet no one will doubt, that it was inserted to exhaust the taxing power.

This view of such cases secured a liberal interpretation in the case *Gordon* v. *The Appeal Tax Court*, 3 How. 145-6, and *Bank of Cape Fear* v. *Edwards*, 5 Ire. 516; and these cases fully sustain the rules of interpretation announced by the Court in *United States* v. *Arredondo*, and Mr. Justice Story, in his work on the Constitution.

For the Commercial Bank it is insisted that, between the the public and the company, the tax to be paid was a subject matter of contract, and that they negotiated and agreed on the amount. It was not intended to be a *bonus*, which is a premium paid at the inception, or in instalments, as the price in case of land sales, but was, as it is called, a tax, in the ligitimate sense of the term. It is to be paid whether there be

profits or not; and it is submitted that, unless it was *the* tax agreed upon between the parties, it was most unreasonable to have fixed the amount. The charter is, in substance, a proposal by the public to this effect, that, for and in consideration, that the company will do this, and that thing, moreover, will pay an annual tax of 25 cents, the company shall have liberty to do thus and so; and, that when the company accepts the offer, it is equivalent to a pledge that no more tax shall be laid.

If the charter admit of this interpretation, the taxing power is exhausted; for, as already shown, it would have been idle to have offered the terms as to a *tax* on the share, and assigned it a limit, if the public intended to reserve the power of taxing *ad libitum* all the other properties of the bank and its members. In case of the *Providence Bank* v. *Billings*, Peters' 514, it seems to be conceded in many parts of the opinion, that if the amount of tax be in the contemplation of the contracting parties, and they fix that amount, it will be *the contract* on this subject, although no words of further exemption be used.

The tax was the same on all the banks chartered before and after the State first undertook to raise revenue from the profits of money-dealing. Although the tax was laid on the share, every stockholder, as well as the public, expected it to be paid *out* of the profits; and in contemplation it was expected to be a tax *on* the profits.

In like manner, there are provisions in the Farmer's Bank, Bank of Charlotte, and the Commercial Bank, *that they shall not issue bills of less denomination than three dollars.* Now, may the public restrain them to issue nothing less than five dollars? If the Legislature cannot do this, it is only because the denomination of the bill was the subject-matter of contract. But, undoubtedly, the Legislature has the same power to alter the limit as to the size of the bills, as they have to advance the tax. Shall we say that the Legislature may limit the denomination to a higher figure? If so, there is not a capitalist who has so understood the charter.

Both the tax and the denomination of the bills are supposed to be matters of great interest to the capitalist, and constitute his inducements to vest his capital. This view is strongly advanced by the Court in *State Bank of Ohio* v. *Knoof*, at from page 380 to 402.

A contract made for a specific tax is binding. "*This tax continues, although all other banks should be exempted from taxation.*" Page 389.

In the case of the Ohio Life and Trust Company, there was no specific tax imposed in the charter. See p. 433-4. The case of the *State Bank of Ohio* v. *Knoof* did not present the question whether the State may augment a specific tax; and the reasoning of the Court is adverse to the position.

The case of *Gordon* v. *Appeal Tax Court*, 3 How. 133, decided in 1844, is the only one which is alleged to be opposed to the claim of exemption from further tax on the Commercial Bank of Wilmington. The facts of the case are stated at length in the reported case; and so far as they affect the case before the Court, do not oppose the position assumed by the defendant. There were two persons claiming exemption; Gordon, under the act of 1821, and Cheston, under the act of 1835. The Court sustained the exemption claimed by Gordon, and denied it to Cheston. The bank in which Cheston was a stockholder was incorporated by act of Dec., 1835, (p. 136.) It was required to pay a bonus, &c. During the same session, and in the same month, (December,) a general law was enacted in regard to banks, embracing banks previously, as well as subsequently, chartered, which, by sec. 3, enacted that all banks should be taxable, and that the exemption theretofore granted, by act of 1821, should limit the taxation *only on the franchises.* See page 136.

This act, enacted at the same session, went out to the public with the charter, and was a clear legislative declaration of a purpose to consider *stock*, &c., a different property from a *franchise;* and, in fact, was a declaration, that the tax imposed in the charter in which Cheston was a stockholder, was not intended to exhaust the taxing power. Doubtless, before

a share of the stock was taken, these two acts, constituting the *chapter of one session*, were before the public. So that, the case properly understood is with the defendant, and renders consistent the decision in this case, with the reasoning of the Court in the cases before cited of *Bank* v. *Knoof*, decided in 1853, and Providence Bank, in 1830. Doubtless the subscribers in the Farmer's and Planter's Bank understood the extent of the exemption to be precisely as the Court held it to be.

With us this supposition is inadmissible as to the subscribers in the Commercial Bank; for we know that, in the estimation of capitalists, the tax was regarded as fixed; and that the charter, on whatever subject it spoke, contained the unalterable terms on which the capitalist could rely, in making up his mind to become a corporator.

The sense in which the sovereign speaks constitutes the meaning of his language; and it would, in substance and effect, make the State to repudiate her engagements, to give to her language, although susceptible of it, a meaning in which she neither intended to be, nor was, understood.

No bank could be established in the State with a reservation of the power of unlimited taxation. *Here* there would be no guard against destruction; because, there being no constitutional requirement for a uniformity of taxation, a few classes of subjects may be selected for raising the entire revenue; and we know that banks would be placed in front of the heaviest exactions. The present Bank of the State rejected the late charter on that ground. And it is but in very modern times, as the necessity for increased taxes has sprung upon us, that financiers have multiplied the properties of a bank in order to find sources of revenue. A bank is the only being whose every property is deemed the fit subject of taxation. When trades are taxed, the profits are excused. No one thinks of taxing the occupation of the farmer, his land, and his profits. To tax a franchise is to tax the profits; to tax bank capital is to tax the profits; a tax on individual shares is a tax on the profits. All is a tax on the profits but in one case, and that is when none are made. A tax on the

capital, with an exemption of *all further tax on the capital*, is, in judicial refinement, a mere mockery. Formerly it meant something, but now it would be a mere trick of the sovereign to allure and deceive.

If such construction is made applicable to banks already chartered, both as to the tax and denomination of the notes, the people are deceived. Will it be answered? Appeal to the Legislature. This admits the error of construction. That is, that the language does not embrace the contract.

The distinction is admitted between what is of the contract and what is not. A corporation enjoys many privileges which are not the subject of the contract, merely because they are tolerated. All these are fit subjects for legislative control. As if three are incorporated for ten years, with a capital to buy and sell liquors. If there is no law restraining the measure of retail, the corporation may sell by the gill; but, assuredly this toleration is no part of the *contract;* and the sovereign may well abate the nuisance of retailing, and limit the quantity to a quart. But if the charter should provide that the company should not sell *less* than a quart, is not this an implied grant to sell by that measure? So of the size of the bills, and so of the tax; because, as is said in the case of the Providence Bank, the subjects were a matter of bargain and contract.

Battle, J. The Act which incorporates "the President and Directors of the Commercial Bank of Wilmington," (act of 1846, ch. 4,) after conferring upon it the usual powers, privileges and immunities of a bank, with a capital stock of $300,000, provides, in the 12th section, "that the President or Cashier of said bank shall annually pay into the treasury of the State, twenty-five cents on each share of said capital stock which may have been subscribed for and paid in; and the first payment of the said tax shall be made twelve months after the said bank shall have commenced operations." The Revised Code, chapter 99. section 20, imposes a tax of three cents upon every dollar more than six dollars of net dividend

or profit upon money vested "in stocks of any kind, or in shares of any incorporated or trading company, whether in or out of the State; and herein shall be included all bank dividends, bonds and certificates of debt of any other State or country, or of any public corporation created by this or any other State."

The question presented by the pleadings in this case is, whether the Legislature had the power, after the reservation of twenty-five cents on each share of the actual capital stock of the bank, to impose an additional tax on the dividends received by the individual stockholders.

The counsel for the defendant contends that it had not, and his argument is, that the grant by the Legislature of the bank charter, created a contract between the State and the corporation; that, by a fair construction, one term of that contract was that the bank should pay into the public treasury twenty-five cents on each share of its actual capital stock, in consideration of which no other or further tax should ever be imposed upon it, or upon the dividends or profits of any of the individual members who composed it; and that the Constitution of the United States prohibits the State from passing any law to impair the obligation of the contract, or of any essential part of it.

We admit that the grant by the Legislature of a charter to a banking corporation, creates a contract between the State and the corporation, which brings it under the protection of the Constitution of the United States. This conservative principle has been repeatedly recognised by this Court, in decisions, of which it is necessary to refer only to the cases of *Mills* v. *Williams*, 11 Ire. Rep. 558, and *State* v. *Matthews*, 3 Jones' R. 451. The same protection which is extended to the whole contract must be extended to every essential part of it; and if it be a term of the contract that the State shall not impose any other tax upon the capital stock of the bank, or upon the dividends or profits of the stockholders than that which is expressly mentioned in the charter, then, we freely admit that the clause of the Revenue Act, to which we have referred, is

inoperative in its application to the holders of stock in the Commercial Bank of Wilmington. The question, then, ceases to be one of constitutional power, and becomes one of construction merely. The question which has been thus presented, has, in late years, been so often the subject of discussion and decision in the Supreme Court of the United States, and in the Courts of the several States, that it would be a work of supererogation to go into an extended argument upon it. We shall confine ourselves to a brief enunciation of the principles upon which our judgment, in the present case, is founded.

It is now a well settled rule of construction, that "the grant of privileges and exemptions to a corporation, are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving undiminished, will be held to be surrendered, unless the intention to surrender is manifested in words too plain to be mistaken." *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. (U. S.) Rep. 435; *Billings* v. *The Providence Bank*, 4 Peters' Rep. 561; *Charles River Bridge* v. *The Warren Bridge*, 11 Peters' Rep. 545. It cannot be denied that the taxing power is one of the highest and most important attributes of sovereignty. It is essential to the establishment, and the continued existence, of the government. Without it, all political institutions would be dissolved, the social fabric would be broken up, and civilization would relapse into barbarism. No government can, then, divest itself, altogether, of a power which is essential to its existence; it cannot commit political suicide; but it is conceded that it may, by contract for an adequate consideration, bind itself, for a longer or shorter period, not to exercise its taxing power at all, or not beyond a certain extent, upon certain persons or things. This is, however, often a dangerous restriction upon its power, because the necessities of the government cannot always be foreseen. In the changes and chances

of time and things, those who have charge of the administration may have need of all the possible resources of the country to save it from great disaster, if not from ruin. These considerations force upon the mind the propriety, nay, the absolute necessity, of the rule that every grant from the Legislature, by which the integrity of the power to raise revenue is impaired, must be construed strictly in favor of the public, and against the grantee. Let us apply this rule to the case before us. The Legislature has granted a charter to the bank in question, in which there is a stipulation for a certain tax to be paid by the officers of the bank, upon each and every share of its actual capital stock, into the treasury of the State. There is no express provision that no other or higher tax shall ever be exacted; but it is contended that there is an implied one to that effect. Why should there be? It is certainly not so in cases very analogous to this. A citizen takes a grant from the State for a tract of land and pays the stipulated price. He has immediately to pay a tax of twelve cents upon every hundred dollars' value of it, by the general revenue law of the State. That is precisely the same as if a tax of that amount were reserved in the grant. The State cannot violate its contract contained in the grant, any more than it can violate its contract involved in the grant of a bank-charter; and yet, whoever doubted that the Legislature may, from time to time, increase the tax upon the land? The same may be said of any taxable personal chattels which the State may sell to an individual. Why should money vested in a corporation be more favored? It would be difficult to assign a good reason for the preference.

But, if it be admitted that the capital stock of the bank is, by its charter, exempted from additional taxation, it by no means follows that the dividends or profits of the individual stockholders shall be exempt. Bank stock, or stock owned by individuals in a bank, is a different thing from the capital stock of the bank. By the first is meant "the individual interest in the dividends, as they are declared, and a right to a *pro rata* distribution of the effects of the bank, on hand at the

expiration of the charter. The capital stock of the bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used and managed in trust for the benefit of the members." *Union Bank of Tennessee* v. *The State*, 9 Yerg. Rep. 490. A tax on the first is very different from one on the latter, and the property is listed and the tax paid in a very different manner. The tax on the dividends of bank stock varies, of course, with the amount declared by the bank, and received by the stockholders. The dividends are listed for taxation, and the tax is paid by the owners of the stock to the sheriff in the counties of their residence. The tax on the capital stock is paid, irrespective of profits, by the officers of the bank, directly into the public treasury. How a provision in a bank-charter for a tax upon one only of two such different subjects of taxation, can be construed into an entire exemption from the other, it is difficult to conceive. It is a more reasonable conclusion that the Legislature intended to reserve for future emergencies the power to raise revenue from that subject of taxation about which it was silent. And this conclusion is strengthened by the reflection that the reserved subject is one upon which the taxation cannot press very heavily. It is to fall on profits; it diminishes when they grow lighter, and is withdrawn altogether when they cease. Such is not the case on many other subjects of taxation. Land and slaves must contribute to the support of the public burdens, whether their owners sigh over empty granaries, or rejoice over barns filled to overflowing. Our conclusion, that the exemption of the capital stock of a bank from any greater impost than that which is specified in its charter, does not exonerate the dividends of the stockholders from such taxes as the Legislature may, from time to time, think proper to impose, is expressly decided in the case from Tennessee, to which we have referred. We have shown that it is directly within the rule of construction extracted from Chief Justice TANEY's opinion in the case of the *Ohio Insurance and Trust Company* v. *Debolt*. Being thus supported by reason, and confirmed by authority, we

state it with confidence as the law of this and all similar cases. The demurrer must be overruled, and the defendant ordered to put in an answer.

PER CURIAM. Demurrer overruled.

THOMAS B. WHEELER *against* SAMUEL S. B. SMITH.

Where one sells, by deed, one-half of a share in an intestate's estate, and the assignee permits ten years to elapse after a legal ascertainment of the amount of such share and the reception of the whole of it by the assignor before a suit is brought for such half, the presumption of satisfaction or abandonment will bar the claim.

The borrowing of a sum of money by the assignee from the assignor within the ten years, and the repayment of a part of it, has no tendency to repel the presumption of payment, &c.

The declaration of the assignor when shown the deed of assignment within the ten years, "that it was not as strong against him as he thought it was," was *held* not to be sufficient to repel the presumption.

CAUSE removed from the Court of Equity of Rockingham County.

The defendant administered upon the estate of his father in 1837, and this suit was brought April, 1854, to recover one-half of the distributive share of Joseph Washburn, who had married Prudence, one of the daughters of the intestate, and one-half of her share of the money arising from the sale of the real estate of William Smith, the same intestate, of whom the said Prudence was one of the heirs-at-law. The defendant had purchased the interest of Joseph Washburn and his wife, in the real and personal estate of the said William Smith, and, as the plaintiff alleged, had sold to him one-half of the same, by virtue of the following instrument of writing, viz.: "Articles of agreement made and entered into, this 31st of October, 1836, between Samuel S. B. Smith and T. B. Wheeler, both of the county of Rockingham and State of North Carolina, witnesseth: that the said Samuel S. B. Smith, hath this day

bargained and sold, and by these presents doth bargain and sell to the said T. B. Wheeler, the one-half of the interest purchased of Joseph Washburn and his wife Prudence, by the said S. S. B. Smith, and purchased of his brother-in-law Joseph Washburn and his sister Prudence, legatees of the estate of William Smith, deceased, it being the whole of the said Washburn's interest and his wife's also, in and to the estate of the said William Smith, deceased, both real and personal, for the sum of fifty dollars, in hand paid by the said T. B. Wheeler, the receipt whereof is hereby acknowledged; and the said Wheeler further agrees and binds himself to pay one-half the amount to Joseph Washburn, of the amount which the said S. S. B. Smith agreed to pay the said Washburn for said claim, which was three hundred and thirty dollars, due and payable some time next year." Signed and sealed by the plaintiff and defendant, and delivered to a third person for safe keeping.

The plaintiff contends that, by force of this agreement, he became a joint-purchaser and co-partner of Washburn and wife. He alleges, in his bill, that the defendant, as administrator, took into his hands, and sold, the personal estate of William Smith, deceased, and received from that source a large amount of money, to wit, about six thousand dollars, of which, the share of Washburn and wife was one-eleventh part; that by a decree of the Court of Equity, the real estate of the said William Smith was sold, and in 1843, the money arising from this sale, went into the hands of the defendant, of which, the interest of Washburn was one-tenth, subject to the widow's claim for her dower; so that the defendant, having possessed himself of both these funds, became, as plaintiff contends, a trustee, and liable to account to him for one-half of the share arising to Washburn and wife.

The bill further alleges, that the sum of fifty dollars, inserted in the agreement, was not paid, nor was intended to be paid, being inserted for form's sake only; and that the sum of one hundred and sixty-five dollars, mentioned in the deed of assignment, was not paid by him, either to Washburn or de-

fendant; because, as he says, before the amount became due to Washburn, the defendant had been appointed administrator, and had received assets to the large amount above stated, and he relied upon him, out of these assets, to pay and satisfy Washburn one-half of what was agreed to be paid him, which he expected would be deducted out of his interest, on a settlement.

By a proceeding in the County Court of Rockingham, at the instance of John W. Wilson and wife, and others, who were distributees of the estate of William Smith, to which all the next of kin were parties, a final settlement, and decree was made and passed in the year 1841, by which the several shares with which the defendant, as administrator, was chargeable, were ascertained and adjudged to be paid, and that the share coming to Washburn was adjudged to be $483,26\frac{3}{4}$.

It was alleged further, in the bill, that in January, 1841, the defendant loaned the plaintiff $68,23, and took his bond for the same; that on 28th of February, 1843, he paid $40, and on 17th of February, 1844, he paid $25, which two sums are endorsed as credits on the bond.

It is further alleged, that in 1853, when the bond was shown to defendant by the plaintiff, the former said, "it was not as strong against him as he thought it was."

The defendant answered, insisting on the presumption arising from the length of time, and alleging matters not material to the view taken of the case as considered by the Court.

There were replication to the answer, commissions and proofs. The testimony relied on to repel the presumption is recited in the opinion of the Court.

Miller, for plaintiff.
Morehead, for defendant.

Battle, J. The contract, the execution of which the plaintiff seeks to enforce, was entered into on 31st of October, 1836. The distributive share of Joseph Washburn in the personal

estate of William Smith, deceased, was ascertained at the August Term, 1841, of the County Court of Rockingham, and the defendant then became liable to the plaintiff for whatever he was entitled to claim under his contract. The real estate was sold, according to the plaintiff's statement, in the year 1843, the bill was filed April, 1854, more than ten years after the plaintiff's right of action accrued, and we cannot discover any thing to prevent the presumption of payment, satisfaction or abandonment, from being applied to it, under the 13th and 14th sections of the Revised Statutes, chapter 65. The alleged payments on the bond in 1843 and 1844, which the plaintiff had given to the defendant in January, 1841, rather favor than repel this presumption; for why should he pay money to defendant, when the latter had in his hands a much greater amount, to which he was entitled?

The declaration made by the defendant, when the written contract was shown to him, in 1853, "that it was not as strong against him as he thought it was," cannot be allowed to repel the presumption which the statute raises. It is manifest, that the beneficial operation of the statute would be lost, if such loose expressions of a party were allowed to defeat its object.

PER CURIAM. The bill dismissed with costs.

JOSEPH PATTON *against* ROBERT THOMPSON.

The guardian of an idiot, or lunatic cannot, without the permission of the Court, exceed the annual income of the estate in expenditures for, and on account of, his ward.

CAUSE from the Court of Equity of Alamance.

This cause was heard at the December Term of this Court, (ante 285,) and a decree then made, referring to Isaac Holt, Esq., the clerk and master in Equity of Alamance, to take an account of the rents and profits of the ward's estate, in the

hands of the defendant, as guardian ; also, by consent of counsel, that he take an account of the whole administration of the guardian. A report by the commissioner is made to this term of the Court, the substance of which is, that the defendant had received from the estate of his ward $248,10, and that he had disbursed $683,73, leaving a balance in favor of the guardian of $435,63. Statements in detail are made, showing how this result is produced; but as the view taken of the matter by the Court concerns its general character, it is not necessary to state the particulars of the account on either side.

The plaintiff made various exceptions to the report, only one of which (the second) is material to the question discussed by the Court. That is as follows: "The commissioner erred in allowing the defendant credit for disbursements beyond the income of the plaintiff's estate, there being no order of the Court to justify the extra expenses."

The cause was argued on the exceptions.

Winston, *Sen'r.*, for plaintiff.
Graham, for defendant.

Pearson, J. There is a general view of this case, which disposes of it without the necessity of entering into the many details presented by the exceptions. The guardian of an idiot, or lunatic, cannot sell his land without an order of the Court. It follows that he cannot, without the permission of the Court, exceed the *annual income* of the estate, in expenditures for, and on account of, his ward ; because, if he can do so, he has it in his power, by exceeding the income year after year, to produce an accumulation of arrears in his favor, so as, in a few years, to make it necessary to sell the land. This is a principle of common law, which is assumed and acted upon, as fully in the statutory provisions concerning idiots and lunatics, as in those concerning infants, (Rev. Code; title "Idiots and Lunatics;") and it is sanctioned and carried very far in its application in the matter of *Latham*, 4 Ire. Eq. 231, where the Court say—"All the lunatic's estate has been converted into

money, and only $942 dollars is now within the reach of this Court. We think that this fund must be retained by the committee, not to pay *his balance* on the debts of any of the creditors, but for the purpose of maintaining the lunatic and his wife and infant children. That the Court must reserve a sufficient maintenance for the lunatic, before making an order for the payment of debts, or allowing to the committee sums already applied by him to that purpose, is clear, from the nature of the jurisdiction in lunacy, as well as from the decisions. In *ex parte Hastings*, 14 Ves. 182, Lord ELDON said he could not pay a lunatic's debts and leave him destitute, but must reserve a sufficient maintenance for him; and *Tally* v. *Tally*, 2 D. and B. Eq. 385, that is cited with approbation by this Court."

When a guardian finds that the income of the ward's estate is not sufficient for his maintenance, it is his duty to submit the whole matter to the consideration of the Court, and to act under its directions; if he proceeds otherwise, he acts upon his own responsibility. We do not refer to an accidental expenditure, made necessary by an emergency—sickness, for instance—when the excess of expenditure in one year may be compensated for, by drawing upon the income of the next year or two. See *Downey* v. *Bullock*, 7 Ire. Eq. 102. But we refer to a regular outlay, exceeding the annual income year after year, so as gradually to run up a balance against the ward, which, if allowed, will force a sale of his estate. Such conduct is a breach of duty; it is not that "prudent management" stipulated for in his bond; and, if carried out, will result in leaving the ward destitute. Our case affords an apt illustration. In 1846 the defendant was appointed guardian of the lunatic; the expenditures exceed the income year after year; and, by the master's report, there is due to the guardian a balance of $435,63, in March 1856. The land of the lunatic, which is his whole estate, allowing for the appreciation of the value of land in that neighborhood, is not worth more than $700; so that, if this balance claimed by the guardian is allowed, by his "prudent management" the ward will

be stripped of everything he owns, and will be left destitute! The question, therefore, is this—shall we refuse to allow the balance claimed by the guardian? or, shall we allow it, and turn the ward over to the County as a pauper? There is no principle, and no authority for allowing the claim.

Upon looking into the testimony, we are satisfied that, by prudent management, the property of the ward could not have been made to yield an annual income more than enough to provide for him a proper maintenance, and cover the outlay and expenditures of the defendant for, and on, his account; we therefore, allow the claims of the guardian to an amount equal to what has been, or ought to have been, received by him as the income of the estate. The result will be to balance the account, and leave nothing due on either side.

PER CURIAM. Decree accordingly.

HIRAM BRINSON AND OTHERS *against* FRANCIS D. THOMAS AND OTHERS.

A deputy sheriff collected money and failed to pay it over, which was recovered out of the sheriff's sureties on his official bond, the sheriff himself being insolvent, *it was held*, that the sureties of the deputy sheriff, on a bond to indemnify his principle against his delinquencies in office, are liable in Equity to the sureties of the sheriff, for the amount thus paid by them.

It was held further, that all the sureties to the sheriff's bond, as well those who had not paid the money as those who had, were properly made parties to this suit.

CAUSE removed from the Court of Equity of Craven County. This case is sufficiently stated in the opinion of the Court.

Green, for plaintiffs.
Bryan, for defendants.

Nash, C. J. Francis J. Prentiss was duly elected sheriff of the County of Craven, and executed his official bond, with the plaintiffs as his sureties. Prentiss appointed the defendant Thomas, as his deputy, and took from him a bond, with the other defendants as his sureties, for the due discharge of his duties. Among the covenants is the following: "So that the said Francis J. Prentiss shall not, by any act or omission of the said Francis D. Thomas, become liable, or subject, to any damage, loss or cost." Claims were put into the hands of the deputy, Thomas, by one Lovick, to a considerable amount, which were collected by him, and appropriated to his own use. The plaintiffs are the sureties of the sheriff, Prentiss, upon his official bond, and having been compelled to pay to Lovick the amount received by Thomas, this bill is brought by them to subject Thomas and his sureties to the repayment of the money so by them paid. The sheriff, Prentiss, is insolvent.

On the part of the defendants it is objected, that the plaintiffs cannot subject them on their bond, because there is no privity between the plaintiffs and defendants. The deputy sheriff is an officer, strictly speaking, unknown to the law. His acts, as such, are the acts of the sheriff, and in the name of the latter he executes, and returns, all process. The bond he gives, therefore, is not an official bond, but a personal contract between the parties. A sheriff, in most of our counties, cannot personally perform all his official duties, and for his ease, and for the public convenience, he is allowed to appoint as many deputies as he thinks proper. These deputies are his agents, and all their lawful acts are his acts, and all their misfeasances are his misfeasances. The bonds which they give the sheriff are for his protection. Persons who are injured by his malversation in office, either in not executing process, or in appropriating to his own use, monies which come into his hands by virtue of his appointment, can have no redress upon his bond, either against him or his sureties. The deputy's bond to the sheriff is not cumulative. The claim of the plaintiffs, in this case, rests upon a different principle; the

right in Equity of a surety who pays a debt, his principal was bound to pay, to be substituted to his rights. He is also entitled in Equity to the benefit of such collateral securities as his principal has taken to secure himself. In this case, the plaintiffs were co-sureties on the sheriff's bond, and though there is no privity between them and the defendants, on the deputy's bond, yet, they stand so far in that relation to them, that, in a Court of Equity, the doctrine of substitution or subrogation will be applied. And, as between those standing strictly in the relation of co-surities, the doctrine of equality is fully settled. Adams' Eq. 269-70. And the ground of relief does not stand upon the notion of mutual contract, expressed or implied, between them; but it arises from principles of equity, independently of contract. 1 Sto. Eq. Jur. p. 472, The duty of exoneration extends to all persons who are within the scope of the equitable obligation. 1 Sto. Eq. Ju. s. 493, 5. The equity of the plaintiffs does not depend upon any contract between them and the defendants, but upon the equity existing between them and the sheriff, Prentiss, which consists, not only in compelling relief from him, but the right to be subrogated to his place, and to his collateral securities. By the bond of the defendant Thomas, the latter bound himself to indemnify the sheriff, not only against any damage, loss or cost, arising from any act, or omission of his, the defendant Thomas; but further, that he should not become *liable* or *subject* to any loss, damage or cost, accruing for any act or omission. Now, there can be no doubt that, upon the failure of the defendant Thomas, to pay to Lovick the money collected for him, a right of action, under the covenant recited, accrued to the sheriff; it was an "omission" on the part of Thomas, which amounted to a breach of his bond; because he, the sheriff, became *liable* to pay the amount to Lovick, and *subject* to a suit on his official bond. The plaintiffs who have paid the debt due to Lovick, as the sureties of the sheriff, have a right to be subrogated in this Court, to his rights against the defendants, and to a decree for all the monies paid by them to Lovick, as sureties of the sheriff, deduct-

ing all just credits to which Thomas may be entitled against the sheriff.

It is objected by the defendants, that persons are made plaintiffs who have no interest in the controversy. All the sureties on the sheriff's bond are complainants; whereas the claim of Lovick was paid by Hiram Brinson and Samuel Mastin; they, therefore, are the parties immediately interested in the claim now brought forward against Thomas. The other plaintiffs are also interested; for, if the debt should not be made out of the defendants, they will be liable for contribution.

The case must be referred to the master, to take an account of the money paid by the plaintiffs Brinson and Mastin, to Lovick, as sureties on the official bond of the sheriff; and, in taking the account, the master will allow the defendants all just credits against the sheriff.

PER CURIAM. Declare accordingly.

ROBERT BROWN *against* MARY GODSEY AND ANOTHER.

Where a person, being insolvent, placed money in the hands of one of his children, with a view to assist such child, and benefit himself, and thereby to defraud his creditors, a judgment creditor is entitled to follow his debtor's money, and to have his debt satisfied out of a tract of land bought with it.

CAUSE sent from the Court of Equity of Rockingham.

The case is fully stated in the opinion of the Court.

Fowle, for plaintiff.
Miller, for defendants.

BATTLE, J. The plaintiff alleges that the defendant Thomas Lytle, being insolvent, sold all of his slaves for cash, and placed the money, or the greater part of it, in the hands of his children, with a view to assist them, and benefit himself,

and thereby to defraud his creditors; that, among other gifts of money, he made one to his daughter, the defendant Mary Godsey, wherewith she purchased a small tract of land of one James Murray; and the plaintiff alleging that he is a judgment creditor, whose debt cannot be otherwise satisfied, insists that he is entitled, in Equity, to follow his debtor's money and have his debt satisfied out of the tract of land in which the money has been so fraudulently invested.

The defendants, father and daughter, both deny these allegations; and the daughter expressly states that she bought the land with her own money, part whereof, to wit, $25, she earned by the labor of herself and her children, and the residue, to wit, $100, she borrowed of one William G. Davis; that she gave her note for the same, which she supposes is still in the hands of his personal representative, he having since died.

The plaintiff's equity is a plain one, if his case be found to be supported by the requisite proofs. See *Gentrey* v. *Harper*, ante, 177, and the cases there cited.

The positive denial of the defendants makes it necessary that the plaintiff should produce something more than the testimony of a single witness. To make his case more difficult to be supported, the defendant Mary Godsey has produced the depositions of *William King*, and *William Blessed*; the former of whom says, he heard her request, and Davis promise, the loan spoken of, and the latter declares that he was present and saw the money counted out to her, upon which she gave her note therefor, with her brother, Archibald Lytle, as surety. There is no proof on file to impeach the characters of these witnesses, though it appears, from their depositions, that they are both unlearned men, as each subscribes his name by making his mark instead of writing it. But notwithstanding all this testimony, we are entirely satisfied by the proof, introduced on the part of the plaintiff, that the defendant Mary Godsey did not, because she could not, without the aid of her father, raise the money with which the land in question was purchased. Three or four witnesses testify that,

about the time when the transaction took place, Mary Godsey lived upon a tract of land which her father then owned, and that she was then, and had been for several years before, a poor woman with a family of children, whom she could with difficulty support; and one of them states that she was very poor, and had to be supported by her father; and they all say that she was not able to make more money than had to be expended for her daily necessities. It is admitted by the defendants themselves that, in the year 1849, the father was broken up, and all his property, except his slaves, taken and sold under execution, for the payment of his debts. His slaves were sold by himself, and according to the testimony of the witness *Johnson*, for about $3,300. Of the disposition of this large sum, he gives no other account in his answer than that he "applied it honestly;" and his daughter says, that about $1100 were applied to the payment of a security debt, which she mentions, and of the residue she knows nothing. Prior to this period, it appears clearly from the proof, that she and her brother Archibald were very poor, and in embarrassed circumstances, but soon afterwards they had money enough to buy property at execution sales, and even to lend.

The testimony shows further, that Wm. G. Davis removed to Virginia before his death, and neither the agent whom he appointed to settle his business in this State, nor his administrator in Virginia, has ever seen or heard of the note which Mary Godsey says she gave for the borrowed money. In addition to this, one witness, *Miles D. King*, swears expressly that Thomas Lytle told him, on a certain occasion, that he was about to be broken up, and that he wished to do something for his children. All the facts and circumstances thus deposed to by the witnesses for the plaintiff, and in contradiction of which, not a particle of testimony is offered by the defendants, lead our minds irresistably to the conclusion, that the story of the loan made by Davis to the defendant Mary Godsey, is either entirely without foundation in fact, or was a contrivance got up to deceive the witness Blessed; and that, in truth, all the money which Mary Godsey had, and with

which she paid for the land in question, was obtained directly, or indirectly, from her father. The result is that the plaintiff has a clear equity to have the land subjected to the payment of his debt, and he may have a decree to that effect.

PER CURIAM. Decree accordingly.

JAMES WOODS AND ANOTHER, EXECUTORS, *against* HUGH WOODS AND ANOTHER.

In fixing the construction of a will, the Court have a right to look to the state of the testator's family, and the condition of his property at the time when his will was written.

The reception of an article of the same kind as that bequeathed, before the will was written, is not a satisfaction of a general bequest of an article of personal property.

A devise of "the tract of land whereupon I now live and reside, containing two hundred and twenty-five acres, more or less," which was made up of an original tract, and several others, afterwards added, and which had been used by the testator as one plantation, will convey the whole tract thus added to, although the number of acres greatly exceeds that stated in the devise.

Where it appears to have been the intention of a testator to confirm a parol gift of a female slave, previously made, the issue of such slave, born before such bequest, will pass, though no mention is made of such issue in the will.

Where a parol gift of a slave is made by a father to his son, and the son, with the knowledge and approbation of his father, bequeaths such slave, and the legatee holds it, under such bequest, for three years and more after the son's death, he will be protected under the statute of limitations.

A bequest to a deceased daughter, and "to the heirs of her body," which is explained in the context to mean the children of such deceased daughter then living, will be construed to pass to such children all that the mother would have taken under such bequest, if she had been alive at the testator's death.

Where a residuary fund is raised by various bequests in a will, and a bequest is made of several slaves to one of the residuary legatees, with a direction that these slaves are to be valued, and "if the valuation shall be more than a due proportion of my estate," such legatee is to refund what is over to

"my estate," *it was held*, that such bequest was not in satisfaction of the legatee's residuary share, until the value of it had been added to the residuum, and that the deduction of the value of the legacy was then to be made.

Where a general residuary fund is ordered to be "equally divided between my above named children," and in several previous items it is ascertained that the testator meant to confirm previous gifts to the children of his deceased children, the parents to whom such bequests are made, being then dead; and it is further provided in this bequest, that the children of a living daughter are to take her share, the fund must be divided *per stirpes* among his living children, and the descendants of his deceased children.

CAUSE removed from the Court of Equity of Orange County.

The bill was filed by the executors of the last will and testament of Joseph Woods, Sen'r., asking the advice and direction of the Court upon certain questions growing out of said will. The following are the provisions upon which the questions arise, viz:

"Item 1st. I give and beqeath to my son Hugh Woods, one negro woman named Pleasant, and one negro boy named Haywood; also one bed and furniture, and a negro girl named Kizza, or the proceeds of the said girl Kizza, if I sell her before my death.

"Item 2nd. I give and bequeath to my son James Woods, one tract of land, whereon he now lives, containing two hundred and two acres, more or less, and two girls by the name of Amelia and Betsey. Farthermore, I give to his son Lambert Woods, my grand-son, the tract of land whereon I now live and reside, containing two hundred and twenty-five acres, more or less; provided the said Lambert Woods shall pay to my grand-son Eli Woods, son of John Woods, deceased, the sum of three hundred dollars.

"Item 3rd. I give to the heirs of my son Eli Woods, dec'd., the tract of land whereon he lived and died, (describing it.) I also give to my son Eli Woods' heirs, one negro girl by the name of Sook. The distribution of all the above named property bequeathed to the heirs of my son Eli Woods, is (to) be governed by the will of the said Eli Woods—I mean his last will and testament.

Item 4th. I give and bequeath to my son John Woods, deceased, one negro man named David.

"Item 5th. I give and bequeath to my daughter Mary Rhew, one negro woman named Milly, and her two children, Mary and Charles, and also one girl by the name of Dorky, and one hundred dollars in money.

"Item 6th. I give and bequeath to my daughter Elizabeth Hall, now deceased, one negro woman named Mahaly, and her two children, by the name of Hally and Hannah, and one girl by the name of Harriet, and one hundred dollars in money—to her and the heirs of her body; I mean the children of the said Elizabeth Hall, deceased, which are now living. * * * * * *

"Item 8th. I also give and bequeath to my daughter Elizabeth Hall, deceased, or to her children now living, the heirs of her body, one negro woman named Cresid, and her three children, Harriet, Haywood, and Phillis, which negroes are to be valued and go towards the proportion of my said daughter Elizabeth, or her said children, the heirs of her body, of my estate; and if the valuation shall be more than a due proportion of my estate, then the said Elizabeth, or the said children, the heirs of her body, shall refund to the estate all that is over.

"Item 9th. I also desire, that my two grand-daughters, Adeline, and Elizabeth, daughters of my son Eli Woods, deceased, shall draw one-third more of my estate than the other three children, that is, Washington, Lucy, and Susan.

"Item 10th. I also desire, that all my negroes, not mentioned in my last will and testament, or otherwise disposed of, together with all my property, of every description, not herein mentioned or otherwise disposed of, shall be sold after my death, and the proceeds arising from such sale, as well as all monies coming into the hands of my executors from the collection of my debts, bonds, &c., due me, shall, after paying all my just debts, be equally divided between my above named children, with the exception of my son William Woods, and my daughter Mary Rhew. I also desire and will that

that part of my estate which would be given to the said Mary Rhew, shall be equally divided between her children, viz., Sarah Frances Carrington, Lambert Hall, Robert Hall, Jane Hall, Martha Hall, Alexander Hall, and William Hall, being children of my said daughter Mary, by her first husband William Hall, deceased."

Upon the *first item*, the facts are, that the testator placed in the possession of Hugh Woods, the legatee, two of the slaves mentioned in this clause, and afterwards, in 1845, he gave him possession of Kizza; that at his marriage, which was more than thirty years before the filing of the bill, he gave him a bed and furniture. The plaintiffs contend, that this item was only intended as a confirmation of the previous gifts, and that there is nothing coming to him by force of the same. This, Hugh Woods admits as to the negroes, but contends, as to the bed and furniture, that the legacy, being a general one, is not discharged by the reception of things of the same kind before the will was made.

Upon the *second item*, arises the following question: The tract of land, called the home place, contained between four and five hundred acres, and was made up of several smaller tracts; the original tract, on which testator settled, contained two hundred and twenty-five acres, and several adjacent tracts were added to it, making the quantity above stated. The whole had for many years been used and cultivated together, and was uniformly designated and called by the testator his *home place* or *plantation;* was given in, assessed, and taxed as one body of land; and parts of the original farm and of the added parts, were fenced together as entire fields. Besides these facts, there was the further fact, that there was not timber enough on the original part to keep up a farm, but there was enough on the other portion. It was contended, that the testator only intended that Lambert should have the 225 acre tract, and that the remainder should fall into the residuum; while he (L.) insisted, that on paying the three hundred dollars, the whole body of land, known as the home tract, passed to him by the devise aforesaid.

Upon the *third item*, arises this question: The female slave Sook had issue, a female child, born in the life-time of the testator, and it is contended on behalf of the residuary legatees, that Sook only being mentioned in the will, and no reference being made to her offspring, or increase, the child of Sook did not pass by the bequest. David McKee answered, and showed the following as the grounds of his claim to the slave in question: Sook, the mother, had been in possession of Eli Woods for many years before the death of the testator, claimed as his slave. In 1840, he made his will, and bequeathed the woman Sook to his (said David's) wife, Lucy Ann, and shortly thereafter, with the assent of the executor of the said Eli, he took possession of the slave in question, and has held her ever since, adversely to all other claimants. Some three years after thus acquiring Sook, she gave birth to the child now in controversy. In behalf of the said David McKee, it is contended, that the will of Joseph Woods, which was made in 1851, expressly ratified that of Eli Woods, which was made in 1840, so that the property passed to him and his wife, Lucy Ann, by virtue of that will; and further, that claiming and holding the property three years, under the will of Eli Woods, gave him a full and absolute right to it by the statute of limitations.

As to the *fourth item*, it was contended that, the legatee being dead at the time of the making of the will, the bequest is void. In reply thereto, it is shown that, many years before the death of John Woods, Dave had been given to him by the testator by parol; that he had sold him with the approbation of the testator and received the money for him; and it was insisted, that this clause was a mere ratification of such previous gift, and therefore valid to pass the right to the representatives of the said John.

As to *item fifth:* The negroes given therein to Mary Rhew, had been put into the possession of her first husband, William H. Hall, more than twenty years before the filing of the bill, and at his death, about five years afterwards, were disdistributed between his widow and children as part of his

personal estate. Mary Rhew, who is again a widow, insists that she is entitled, not only to the one hundred dollars, but also to the slaves therein bequeathed to her; and that it is the duty of the plaintiffs, as executors, to sue for the same and recover them for her. On the part of the children, it is contended, that by the 10th item of the will, all that she might have been entitled to, of her father's estate, was given to them, and that this provision extends as well to the pecuniary bequests, (to wit, the $100, and a share of the residuum) as to the slaves. She had no children by her second marriage.

Upon the *sixth and eighth items* of the will, various questions arise between the parties: John R. Hall, the husband of Elizabeth, under a parol gift, took possession of the slaves bequeathed in the sixth item, carried them to the State of Mississippi, more than twenty years ago, where they have been ever since. It is contended by some of the legatees, that these bequests to Elizabeth Hall are void, she being dead at the time of the making of the will, and that the value of the slaves given her, and the $100, should go into the residuum.

It is contended further, by the legatees, that the negroes mentioned in the 8th item do not pass, because they are given only in the alternative; but if the legacy is valid, that the value of these slaves ought not to be added to the general residuum, but that that should be made up without such addition, and that the children of Elizabeth Hall were intended to have these negroes in satisfaction of their part of that residuum.

Upon the *ninth item*, the five children of Eli Woods contend that they are entitled, altogether, to one share of the residuum, and that Adeline, and Elizabeth, are each entitled to one-third more than the entire share; while it is insisted by the other residuary legatees, that the children of Eli Woods, are not entitled to any part of the residuum; but if they are entitled, it is only to one share among them all.

The questions arising out of the 10th item are already stated incidentally. They are succinctly embraced in an enquiry, to whom does this residuum belong? and in what proportions?

and whether its distribution is to be *per stirpes* or *per capita?*

As to what that residuum shall consist of, various questions have already been propounded in stating the controversies about the several distinctive bequests in the will.

All the parties interested in the will, and the representatives of the dec'd. legatees, are made defendants, viz., Hugh Woods, Lambert Woods, Mary Rhew, the children of Mary Rhew by her first husband, William Hall, the children of Elizabeth Hall, the children of John Woods, the heirs and children of Eli Woods, and the executor of David McKee; who answered severally.

There was replication to the answers.

The cause was set down for hearing on the bill, answers and exhibit, and sent to this Court.

Norwood, for plaintiffs.
Graham and *Bryan*, for defendants.

Battle, J. Many questions are presented by the pleadings upon the construction of the will which is now before us. It was evidently written without the assistance of counsel, and needs all the aid which can be derived from that circumstance, to enable us to give effect to the wishes of the testator. It affords evidence of itself, that it is the will of an old man, whose numerous children had all grown up, most of them had married and had issue, and several of them had died, leaving families of children. It appears, from the admitted allegations of the bill, that most of the slaves, and some of the property bequeathed and devised to the legatees and devisees respectively, had been advanced to them, by the testator, many years before the will was made. We mention these things, because we have the right to look to the testator's family and the condition of his property at the time when his will was written, in order to fix a construction upon it. See *Bivens* v. *Phifer*, 2 Jones' Rep. 436, and the cases there referred to.

Having premised these general rules, we proceed to answer the questions in the order in which they are presented in the bill.

1. The first question presented for our consideration is, whether Hugh Woods is entitled to a bed and furniture, under the first item of the will. The bequest to him is of certain slaves by name, "also one bed and furniture, and a negro girl by the name of Kizza," &c. He admits that he had received the slaves, and also a bed and furniture, as gifts from his father, long before the making of the will, and he sets up no claim for the slaves under the bequest, but insists that he is entitled to another bed and furniture, because the legacy is a general one, and therefore, not discharged by the reception of an article of the same kind long before.

For the reason assigned for the claim, we think it must be allowed.

2. The cases referred to by the counsel of Lambert Woods, show clearly, that he is entitled to the tract of land on which the testator "lived and resided" at the time of his death. It consisted of several distinct parcels, and was occupied and cultivated by the devisor as one plantation. *Bradshaw* v. *Ellis*, 2 Dev. and Bat. Eq. 20; *Bolick* v. *Bolick*, 1 Ire. Rep. 244; *Stowe* v. *Davis*, 10 Ire. Rep. 431.

3. There can be no doubt that David McKee is, in right of his wife, entitled to the child of Sook, born in the testator's life-time. The general rule is such as is contended by those who oppose the claim of the legatee; but there are two circumstances which prevent its application in the present instance. The testator had made a parol gift of Sook, to his son Eli, many years before, who, upon the marriage of his daughter Lucy with David McKee, made a similar gift of the girl to her. Eli Woods died, and by his will confirmed the gift, and David McKee kept the girl, claiming her as his own for more than three years before the testator's death. His will also refers to, and confirms, that of his son Eli; hence, it follows that the child of Sook, which was born after Eli's death, was the property of the legatee under his father's will,

as well as under his will. Moreover, the bailment of the slave was terminated by the death of Eli, and the possession of her by the legatee, for more than three years, gave him a title to her, and all her increase born during such possession. *Powell* v. *Powell*, 1 Dev. and Bat. Eq. 379; *Richardson* v. *Pridgen*, 8 Ire. Eq. 153.

4. The bequest in the fourth item, of negro David to John Woods, deceased, would be void, were we not at liberty to construe it as a confirmation of the parol gift made by the testator to his son John, in John's life-time. Such was undoubtedly the intention of the testator in many of the bequests made to his living children, and we cannot see any reason why it may not be carried into effect in this, as well as in the other instances.

5. Mary Rhew is entitled, under the bequest in the fifth item, to the general legacy of one hundred dollars. The specific bequest of the slaves was a mere confirmation of previous parol gifts.

6. Mary Rhew is expressly excluded from any share in the residue given in the 10th item of the will, and the part to which, as one of the children, she might have been otherwise entitled, is expressly given by the testator to her children by her first husband, William Hall. It seems there was no issue of her last marriage.

7. The slaves bequeathed in the sixth item, to Elizabeth Hall, deceased, to her and the heirs of her body, were advanced to her and her husband many years before, and the bequest is operative, so far only as to confirm such gifts. As the testator himself explains that, by heirs of her body, he meant her children now living, and mentioned her as being dead, his intention is clear to give the children what she would have taken if alive; and in that view, they have a right to the general legacy of one hundred dollars given in that item.

8. The children of Elizabeth Hall are also entitled to to the slaves mentioned in the eighth item. The testator having noticed that their mother was dead, it is manifest, that he intended the children to take in her stead; and as the bequest

is in the alternative, to her *or* them, there is nothing to prevent them from taking it. They are also entitled to a share of the residue, unless the slaves given to them by this item, shall equal, or exceed in value their proportion of the testators " estate." If there be an excess of value they are to refund it. By his *estate*, the testator here means, what he had not otherwise disposed of by his will, and left to fall into the residuum. Nearly all the slaves given by the will, were mere confirmations of previous parol gifts, and of them, he did not wish any account to be rendered. Some other devises and bequests are made, which are not required to be valued, and of which, we therefore conclude, that he did not wish any account to be taken in the division of the residue. But the slaves bequeathed in this item, are required expressly to be valued, and that value is directed to be accounted for in the division of the residue. That value then must be added to the value of the residue, in order to ascertain the proportions to which Elizabeth Hall's children are enlitled. The construction contended for by the other legatees, that the amount of the residuum is to be ascertained without these slaves, and then, that the children of Elizabeth Hall are to take the slaves in payment of their share of the residuum, is altogether inadmissible, because it would defeat that equality in the division of his " estate," indicated in the eighth item of his will.

9. The preference given by the ninth item to the testator's grand-daughters, Adeline and Elizabeth Woods, in the distribution of the residue is, by an obvious construction, confined to the division between them and their brothers and sisters, of the share to which they all may be entitled. This view is made clear by the intention apparent from the latter part of the eighth and the tenth items, to have an equal division of the residuary estate between the testator's living, and the families of his deceased, children.

10. From what we have already said, it will appear that our opinion is, that the residuum, including the value of the slaves given specifically to Elizabeth Hall's children, is to be equally divided *per stirpes* between the testator's living chil-

dren and the children of his deceased children, excluding therefrom his own son, William Woods, and his daughter Mary Rhew, but putting the children of the latter as legatees in her place, to take among them one share.

There must be a reference for the purpose of taking the necessary accounts, with a view to the distribution of the testator's estate according to the principles announced in this opinion.

PER CURIAM. Declare accordingly.

JOHN Z. DAVIS AND OTHERS *against* STEPHEN W. COTTEN AND OTHERS.

Where a trustee is invested with an estate or an unclosed trust, no length of time will bar its recovery.

Where a mere equitable right of action exists, it must be enforced within a reasonable time, or else, for the sake of repose, it will be considered as having been abandoned, released, satisfied, or in some way arranged.

The application of the statute creating a presumption of payment, &c., does not depend upon the party's knowledge of his rights.

CAUSE removed from the Court of Equity of Chatham County.

Roderic Cotten, by his will, directed his debts to be paid out of the proceeds of his perishable estate, and bequeathed to his wife, Ann, certain real and personal estate, and certain slaves by name. He also, by his will, gave certain real estate and slaves, specifically, to his son Stephen W. Cotten, and after some other legacies, directed and declared that all the residue of his estate should be divided into two lots, and then proceeds as follows: "One of which I give unto the children of my son R. C. Cotten, to be equally divided between them, share and share alike; the other lot I lend to my said son S. W. Cotten, during his natural life, and at his death I give the same unto the said children of my son R. C. Cotten; provided, nevertheless, that if my said son Stephen Wright Cotten, shall

leave alive at his death, any child or children of his body, lawfully begotten, then I give the last mentioned lot to such child or children."

There was a large number of slaves, that were included in this clause as part of the residue; among others, a negro woman named Lavinia, who, at the death of the testator, had two children, Fanny and William, and the woman and her daughter have since had a very numerous issue, whose names are set forth in the bill.

Mrs. Ann Cotten, the testator's widow, and Thomas Snipes were appointed executors in the will, who both qualified, but the latter alone acted in the business of administering the assets. At August term, 1827, of the County Court of Chatham, the executors, alleging that it was necessary to enable them to execute the trusts devolved upon them by the will, obtained an order to sell the slaves Lavinia, Fanny and William, under which these slaves were sold, and bought by one Charles Williams, for, and on account of, the executrix, Mrs. Cotten, who took them into possession, and held them as her own, until her death, which took place in 1843.

Mrs. Ann Cotten bequeathed the slaves Lavinia, Fanny and William, with the increase of the females, to the defendant S. W. Cotten, and appointed him executor of her will. The executor qualified, and has held possession of these slaves ever since the year 1843, claiming the absolute right to the same.

About the year 1828, the plaintiffs, by their guardian, R. C. Cotten, with the defendant, S. W. Cotten, petitioned for a division of the slaves, to which they were severally entitled under the residuary clause in the will of Roderic Cotten. In pursuance hereof, a division of these slaves was made, and the commissioners appointed for that purpose made their report at the February term, 1830, of that Court, which was, in all things, confirmed. The petition, in setting out the rights of the parties, asserts no claim to Lavinia, Fanny nor William, nor to their offspring; neither does the report of the commissioners notice them. The slaves thus allotted have been enjoyed by each party, without question, ever since.

The bill is filed by the plaintiff Davis, and his wife Elizabeth, the latter of whom is one of the daughters of R. C. Cotten, and who was married in 1838, while yet an infant, and by John A. Cotten, a son of the same, claiming two-thirds of one-half of the slaves Lavinia, Fanny, and their increase and William, alleging that the sale of these slaves was illegal, and unnecessary, and that, being purchased by the executrix, they still constitute a part of the residue under the will. Emily Crump, the only other child of R. C. Cotten, born at the death of the testator, is made a party defendant, being entitled, as plaintiffs say, to the other third. The plaintiffs claim, also, a contingent interest in the whole of the slaves taken by S. W. Cotten by virtue of this clause in the said will.

Thomas Snipes died in 184–, having made a will, appointing therein several executors, of whom only Edwin Snipes proved the will and qualified. He is made a party defendant. It is alleged that a sufficiency of assets to answer the plaintiffs' claim have come to his hands. S. W. Cotten and Emily Crump are also made defendants.

The prayer is for a decree for the plaintiffs' interest in two-thirds of the slaves mentioned, and their increase, and for an account of the hires of these slaves; also for writs of sequestration, and *ne exeat*, against S. W. Cotten, to restrain him from removing any of the slaves which he has received under the residuary clause aforesaid; also for general relief.

The answer of the defendant S. W. Cotten states that, at February term, 1830, Thomas Snipes, the acting executor, made a settlement of his administration of the estate of the testator, with commissioners appointed by the County Court of Chatham, in which, amongst other things, he was charged with the price of the slaves Lavinia, Fanny and William, and a balance was reported against him of $496,06¼. A copy of the record of the County Court of Chatham, showing this settlement and report, is filed as an exhibit.

The defendant Cotten insists that this settlement by the acting executor, closed the trust, and having had possession of the property in question, from the date of 1830, until the fil-

ing of this bill in 1853, during the last 15 years of which time the plaintiff Davis was the husband of Elizabeth, and could have brought suit, he is protected by the length of time.

He also insists that the petition for a division of the slaves, without asserting any claim to Lavinia, &c., the actual division and the action of the County Court upon the report of the commissioners, show an abandonment of the claim.

By an interlocutory order of this Court, a reference was made to a commissioner "to enquire whether Thomas Snipes, the acting executor of Roderic Cotten, paid to S. W. Cotten, or R. C. Cotten, or otherwise discharged, the sum of $496,06½, which is reported as the balance in his hands by the final settlement filed at February term, 1530, of the County Court of Chatham."

The commissioner reported that the balance was, at that time, paid to S. W. Cotten and R. C. Cotten, whose receipts in full were filed by Thomas Snipes, and are now produced by his representative.

There were replication, commissions and proofs taken.

The cause was set down for hearing upon the bill, answer, exhibits, proofs, the report of the commissioner, and former orders, and sent to this Court by consent.

Bryan and *Phillips*, for plaintiffs.
Haughton, for defendants.

Pearson, J. The pleadings in this case are loosely drawn. At the last term it became necessary to direct an inquiry—did Thomas Snipes, the acting executor of Roderic Cotten, pay to Stephen W. and R. C. Cotten, the balance of $496,06½, reported as the amount in his hands by his final settlement, filed at *February term*, 1830, of the County Court of Chatham? The commissioner reports that the balance in hand, to wit, the sum of $496,06½, was, at that time, paid over to Stephen W. and R. C. Cotten, whose receipts in full were filed by the said Thomas Snipes, and are now produced by his personal representative. This balance includes the price of Lavinia and her

two children; so the trust which was undertaken by Snipes and Mrs. Ann Cotten, as the executors, was then closed.

Lavinia and her two children were bought by Mrs. Ann Cotten through her agent, Charles Williams, who bid for these slaves and many other articles for the widow. They did not pass out of her possession, but were kept by her until her death, and then passed into the hands of the defendant, as her executor and legatee.

In *July*, 1838, the plaintiff Davis married one of the daughters of R. C. Cotten, and by the *jus mariti*, although she was under age, he, as husband, had a right to receive and release the legacy due to her. Thus, near fifteen years have expired since he had a right to insist that the sale of Lavinia and her two children should be set aside. He is inactive during all that time; does not in his bill assign any reason for the delay; and yet the title to a large family of negroes is now, as he insists, to be overhauled, and accounts of hires and profits, reaching back upwards of twenty-four years, taken; because he did not see proper to assert his right within a reasonable time. Upon the argument, it was suggested, that Davis has been all this time ignorant of his rights, because the property was purchased in the name of Charles Williams; and yet he admits that the property never for a moment went out of the possession of Mrs. Cotten. Her possession was surely enough to put him upon enquiry; but he does not even allege that he did not know all about the fact that Williams had bid in the property for the widow, which is a common practice, resorted to under the mistaken notion that the interposition of a third person will give effect to a sale where the executor indirectly buys at his own sale. So far as his allegations are concerned, there is no more reason why he might not have filed his bill after the expiration of thirty years, as well as after the expiration of fifteen.

The idea that one cannot, by acquiescence, *confirm a title*, unless he is proved to have been aware of his rights, supposing, for the sake of argument, that the long possession of Mrs. Cotten did not amount to notice, is not applicable to statutes

of limitation, or the kindred statutory provisions of our law in regard to the presumption of an abandonment, satisfaction, or release of rights, as well equitable as legal; because those statutes do not proceed on the notion of a confirmation, but on the ground of necessity; because public policy requires repose, so as to prevent the assertion of rights that have been so long neglected and unattended to, that to enforce them, would "work greater injustice than to pass them by as abandoned, released or arranged, in some way or other." This is so obviously a favorite policy with the Legislature, that the Courts are obliged to carry it fully into effect. The whole purpose of creating repose would be marred, if, in every instance, enquiry must be instituted as to the party's knowledge of his rights.

It was said in the argument, "this is a bill for a legacy;" so, the statute of presumptions does not apply. Here is a misconception, caused by not attending to the distinction between *estates* in equity and *rights* in equity. Where there is an express trust, or where an executor or administrator holds a legacy, or distributive share, without closing up the estate by a final settlement, the cestui que trust, legatee, or distributee, has the *estate* in equity. The trustee, executor or administrator, holds the legal title without any conflict or clashing of rights, or anything in the nature of adverse possession. On this ground, it was held, that our statute in regard to presumptions does not apply to such cases; and the remedy can only be defeated by the common law presumption, or by a presumption of fact. *Hamlin* v. *Mebane*, 1 Jones' Eq. 18. But where there is no express trust, and equity is invoked to *create* a trust, on the ground of fraud; or where an executor or administrator files a settlement, receipts are passed, and the matter is considered as ended, if a legatee, or distributee, seeks to impeach a settlement, on the allegation of fraud, or to set aside a sale of some article, on the ground that the executor or administrator cannot buy at his own sale, and of a right in equity to have the executor or administrator, so purchasing, converted into a trustee—not because there was fraud

in fact, or any inadequacy in price, or any contrivance whereby to get the property for a less sum than others would have been willing to give for it, but because "there might have been fraud"—in all such cases, the party is not looked upon as having an *estate* in equity, but as having a mere *right*, which he must enforce within a reasonable time, or else, for the sake of repose, it will be considered as having been abandoned, released, satisfied, or arranged, in some way. *Nelson* v. *Hughes*, ante, 34; *Thompson* v. *Thompson*, 1 Jones' Rep. 430. Hence, the importance of the enquiry which was directed in this case. If the executors had made no settlement, or had not paid over the balance, there was an express and unclosed trust, as to which the statute of presumptions does not apply; but if the executors had closed up the business, and the several legatees had received their legacies, "and filial portions," then, there was no express trust, but a mere right to have the executrix converted into a trustee, in regard to Lavinia and her children; which is the very sort of equitable right that falls within the operation of the statute, and comes peculiarly within the mischief which the statute intended to remedy.

PER CURIAM. Bill dismissed with costs.

RUFUS BARRINGER, ADM'R., *against* THOS. COWAN *and others.*

A and B were the only children of a deceased sister of the testator; to A he gave one thousand dollars, and to the children of B the like sum; he then orders one-third of a residuary fund to be divided between A and the children of B, and the other two-thirds to go to the children of C and D, and then adds, "the part that shall fall to each family, to be divided share and share alike;" it was *held* to be the testator's intention to give A one-half of a third of the fund.

Bequests to colleges and churches are liable to pay tax under the Revenue Act. Rev. Code, ch. 99, sec. 7.

Cause removed from the Court of Equity of Rowan County.

The bill was filed by the plaintiff, as the administrator with the will annexed of Alexander W. Brandon, asking the advice and direction of the Court upon certain questions arising out of the construction of the will.

Having in previous clauses of the will given to Thomas Cowan one Thousand dollars, and to the children of James L. Cowan one thousand dollars, the provision, on which the chief difficulty arises, is as follows:

"If my estate should amount to more than the sums of money which I have given and devised in the above legacies to the several named persons, in that event, the balance that shall remain after paying all the legacies, shall be divided *into three shares or parts, and that Thomas Cowan, and the children of James L. Cowan, have one part or share*, and the children of George Locke one part or share, and the children of John S. Brandon, one part or share. The part or share that shall fall to each family, is to be divided, share and share alike."

Thomas Cowan and James L. Cowan, mentioned in this extract, are the only surviving children of a deceased sister of the testator. James L. Cowan, at the death of the testator, had three children, and his wife was at that time pregnant with another, which afterwards was born, and is still living.

The bill sets forth, that Thomas Cowan claims *one-half* of the share or part allotted to him and the children of James L. Cowan; whereas, the children insist, that he is only entitled to come in *per capita* with them, viz., to take *one-fifth*.

Another question arising upon this clause is, whether the child of James L. Cowan, that was *in ventre sa mere* at the testator's death, is entitled to come in for a share with the previously born children.

Among other bequests, is a pecuniary legacy to the trustees of Davidson College, and another to the elders of Thyatira Church, in Rowan county, and a question is raised, whether these legacies are liable for a tax under the Revenue law of the State?

James L. Cowan's children, Thomas Cowan, the trustees of Davidson College, the elders of Thyatira Church, and all the legatees of the testator, are made parties; and besides the instructions asked as above stated, the plaintiff prays that an account may be taken of his whole administration, and that the same be closed and settled by a decree of this Court.

There were answers, insisting upon the interests of the several parties above suggested, but in no wise varying the statement of facts as set forth in the bill.

No counsel appeared for the plaintiff in this Court.
Boyden, for the defendant.

Battle, J. The main question presented by the pleadings is involved in the construction of the following clause in the will of the late Alexander W. Brandon: "Now, if my estate should amount to more than the sums of money which I have given and devised in the above legacies to the several named persons, in that event, the balance that shall remain, after paying all the legacies, shall be divided into three shares or parts, and that Thomas Cowan and the children of James L. Cowan have one part or share, and the children of George Locke one part or share, and the children of John S. Brandon one part or share; the part or share that shall fall to each family is to be equally divided, share and share alike."

At the time of the testator's death, James L. Cowan had three children only, but another was born to him within less than nine months afterwards, and having been, therefore, *in ventre sa mere* at that time, he is entitled to take with the others. Thomas Cowan claims one half of the third part or share of the residue, while the children of his brother, James L. Cowan, contend that he is entitled to an equal share only with each of them; that is, to one-fifth part of such part or share. If this clause of the will stood alone, we might think that the claim of James' children was right; but viewing it in connection with other parts of the will, we are led to the conclusion that such was not the intention of the testator. In the fourth item, he gives to his nephew Thomas Cowan, one thousand

dollars; and in the fifth, he gives the same amount to the children of his nephew James L. Cowan. He thus indicates a purpose to place his nephew Thomas upon an equal footing with the children of his nephew James, considering such children as a unit, and standing in the place of their father. Why he gave nothing to James himself, does not appear. Whether he was not so great a favorite with the testator as was his brother Thomas, or whether he was an unsafe depository of his uncle's bounty we are not informed. But whatever may have been the reason why his uncle overlooked him, we are not at liberty to presume that the testator intended a greater bounty for him indirectly, by giving it to his children, than he did for his nephew Thomas, who is particularly indicated as one of the objects of his regard.

In support of the idea that Thomas was intended to have as much of the third part of the residue, as all the children of James together, the words "each family" in the latter part of the clause in question may, by a construction not at all strained, be referred to "the children" of the three persons previously mentioned, making an equal division among each set of children, of the part or share which it took. Indeed, this seems to be the most natural construction; for Thomas is mentioned as a distinct person, while the children are described as a class; and Thomas and his brother's children could not properly be called one family, while each set of children could, with the strictest propriety, be denominated "each family." For these reasons, we are of opinion that Thomas Cowan is entitled to one-half of one-third, or one-sixth of the whole, of the residue.

We are clearly of opinion that bequests to the trustees of Davidson college, and to the elders of Thyatira church are liable to the tax imposed by the 7th section of the 99th chapter of the Revised Code, title Revenue. The words of the act contain no exception in favor of the college or church, and the property will not be exempt from taxation until they receive it.

PER CURIAM. A decree may be drawn in accordance with this opinion.

JOHN W. ODEN AND WIFE AND OTHERS *against* JAMES WINDLEY, EXECUTOR, AND OTHERS.

During the pendency of an issue of *devisavit vel non*, and before the will is admitted to probate, the widow enters her dissent; it was *held*, that her dissent is effectual, and that her personal representative is entitled to a distributive share.

Where a residuary fund is bequeathed to "all my legatees, equally to be divided," it was *held*, that persons to whom gifts of slaves were confirmed, and one dollar in addition given, were entitled to come in for a share under the description of legatees.

Where a residuary fund is bequeathed to all my legatees, equally to be divided, it was *held*, that one, to whom a life-estate was given, remainder to his children, must come in with his children for one share between them.

A legacy given to an executor does not deprive him of commissions, unless it is expressly mentioned as being in *lieu* of them.

Where a share in a residuary fund is given to persons that had been advanced by deeds of gift, which are ratified by the will, there is no reason why they should account for their advancements before they shall take such share.

CAUSE removed from the Court of Equity of Beaufort County.

The bill was filed by the plaintiffs, as legatees under the will of Ruel Windley, against the executor and the administrator of his widow, and against other legatees, for an account and settlement of the estate. Various questions are raised by the pleadings, growing out of the construction of the will, of which the following is a copy of the material parts, viz:

Item 1st. gives to his daughter Rebecca Ann Oden, a large number of negroes, (naming them); also several tracts of land, (describing them,) and many small articles.

Item 2nd. gives to his grand-son George C. Rispass, three several tracts of land.

Item 3rd. "I give and devise to my grand-son George C. Rispass, all the lands that lie," &c., describing them.

"Item 4th. I give and devise to my two grand-sons, George C. Rispass, and John B. Rispass, all my river-shore lands, lying on the North side of Pamlico River, and known as the William Windley, dec'd., lands, excepting one hundred acres, which I shall lend to Ruel W. Jordan, and give to his chil-

dren; and I also except one hundred acres, which I shall give to my friend James Windley; and the rest of the said tract to be equally divided between them—the said George and John B. Rispass.

"Item 5th. I lend to my grand-son Ruel W. Jordan, his life-time, and give and devise the same to his children, a tract of land which is excepted out of the above tract, being the house and land where he now lives, beginning," &c., (describing it,) "to have and to hold, to them and their heirs, in fee simple forever.

"Item 6th. I give and bequeath to my grand-sons George C. Rispass, and John B. Rispass, the following property," (describing eight negroes, and a great number of articles of personal property,) "to be equally divided between them, share and share alike. I give unto George C. Rispass, negro boy Abram, son of Jack.

"Item 7th. I give and devise to my grand-daughter Martha Minerva Topping, one tract of land, (describing it). I also give and bequeath to the said Martha M. Topping the following negroes, being the same that I loaned to Hannah Topping, wife of Ira Topping, in her life-time, and now in the possession of Ira Topping; and also, I give her a negro boy Jim, son of Rose, now in my possession; I also give her two cows and calves, and give her five hundred dollars, provided there is a residue left after all the legacies are taken out, the said five hundred dollars to be kept at interest until she arrives at age," with a limitation over to Rebecca Oden and others, in case the said Martha should die "without lawful heirs of her own body."

"Item 8th. I give and bequeath to my son Zachary Windley, all the negroes I formerly gave him, by deed of gift, and in advance and full share of my negroes, I intended to give him. Also I give him one dollar cash.

"Item 9th. I give to my daughter Jerusha Allen all the negroes which I formerly gave by deed of gift as her full share of negroes, which was intended for her. I give her one dollar in cash.

"Item 10th. I give and bequeath to my friend and relative, James Windley, for services done me by him, the following tracts of land, (describing them); I also give unto him, my friend James Windley, two hundred and fifty dollars in good negotiable notes; also I give to him two cows and calves, and ten head of sheep.

"I give unto my beloved wife, Priscilla H. Windley, two cows and calves, ten head of sheep, one mahogany table, three black walnut chairs. I lend unto my wife, Priscilla H. Windley, the following negroes, (naming them,) during her natural life or widowhood, and then to be equally divided between my legatees mentioned in this my last will and testament; and I also lend to my wife, Priscilla H. Windley, during her natural life or widowhood, my dwelling house, &c., one year's provision, &c. Now, I will and desire that all of the property of mine not disposed of in this my last will and testament, both real and personal, shall, at my death, be sold at a credit of six months, and the proceeds of the same be equally divided between all of my legatees mentioned in this my last will and testament, share and share alike; and lastly, I do hereby constitute and appoint my trusty friend, Benjamin F. Eborn, and James Windley, my lawful executors."

This will was offered for probate, by the defendant James Windley, one of the executors therein named, who alone qualified, and a caveat entered in the County Court of Beaufort, upon which an issue was made up to try the validity of the same. This issue was pending in that Court from March term, 1853, until December term, 1854, when, by a verdict of a jury, it was finally established as the testator's will, and recorded as such. During the pendency of this issue, to wit, at December term, 1853, of that Court, Mrs. Priscilla Windley had her dissent to the will entered of record, and afterwards, and before the same was admitted to probate, died intestate, and defendant R. M. Spier, was appointed her administrator.

The bill is filed by Oden and wife, George C. Rispass, John B. Rispass, and Ruel W. Jordan, against James Windley, the

executor, who qualified, praying for an account, and for a decree for the payment of their legacies; Zachary Windley, Cannon D. Allen and wife Jerusha, Martha Topping, and R. M. Spier, the administrator of Priscilla Windley, are also made parties defendant.

The answers of the several defendants raise these questions:

1st. Whether the dissent of Mrs. Windley to her husband's will, is effectual?

2nd. Whether Zachary Windley and Jerusha Allen take, as legatees, under the residuary clause?

3rd. Whether Ruel Jordan and his children are entitled to a share of the residuum? and if so, whether each one of them comes in for an equal share, or whether they take one share between them.

4th. Whether the executor is entitled to commissions over and above his legacy.

5th. Whether, if Jerusha Allen and Zachary Windley are entitled to come in for a share of the residuum, they must bring in the property advanced to them by deeds of gift in the testator's life-time, and confirmed to them by the will, before they can take such share.

There was replication to the answers, and the cause set down for hearing upon the bill, answers and exhibit, and sent to this Court by consent.

Rodman, for plaintiffs.
Donnell, for defendants.

Pearson, J. A widow, after the will of her husband is offered for probate, and while the proceedings are pending upon a caveat, duly enters her dissent; she dies, and the will is afterwards admitted to probate; is the dissent effectual?

The object of the statute in requiring the dissent to be entered "within six months after the probate," is to prevent the confusion and inconvenience that would be caused by a dissent after the estate had been settled and the property is

handed over to the respective legatees. This object is answered fully, as well by entering the dissent when the will is offered for probate, or pending the proceedings on a caveat, as after probate is made; in fact, better than if it be not entered until the six months have nearly expired. That time is allowed for her benefit; she, consequently, may waive it. We think the dissent is effectual.

The circumstance that the widow died before the probate, if it has any effect at all on the question, rather tends to show that our construction is correct; for surely, the right of the widow ought not to be made dependent upon the accident of her death during the time of a protracted litigation which the next of kin see proper to originate, by entering a caveat. To avoid this injustice, after the caveat proves to have been groundless, the probate would, if necessary, have relation back to the term at which it was offered; indeed, for many purposes, the relation back is allowed.

A widow's dissent is not to be governed by the considerations applicable to her petition for a year's provision. That is temporary; but *dower*, and a *reasonable part of the goods*, are fixed rights conferred by the ancient common law, and such a construction should be given to the statute as to maintain them, and they should not be cramped by a rigid construction, and sticking to the letter, when the object of the statute does not make it necessary. A widow to whom the will gives nothing, may dissent even after the six months. *Miller* v. *Chambers*. (This case is not reported, but is referred to in *Craven* v. *Craven*, 2 Dev. Eq. 338.)

2. Do Zachary Windley and Jerusha Allen, take as legatees under the residuary clauses, or are they excluded? They are certainly "legatees mentioned in the will," and are consequently entitled to take under these clauses, unless there be something to exclude them. As they fill the description, in order to their exclusion, there must be some positive words expressing an intention to that effect, i. e., "I give them one dollar each, *and they are take no more of my estate*." *Nannock* v. *Horton*, 7 Ves. Rep. 391. We can see nothing in the

will indicating an intention to make a difference between those children who had received property by deeds of gift, and those to whom specific legacies are given. The legacy of one dollar to each of these two children may as well have been inserted for the purpose of making them legatees, so as to take under the will, as for the purpose of excluding them from taking under the residuary clauses. If he had given them five hundred dollars each, it would have made the former purpose clear. The smallness of the amount prevents any satisfactory inference one way or the other. We think they are entitled to a share in the residuum.

3. What interest does Ruel Jordan and his children take under the residuary clause? A tract of land is devised to him for life, remainder to his children; it is but a single legacy, the estate being divided, and they represent and take the share of *one* legatee in the residuum. It is true, they are all legatees; but in the sense in which the testator uses the term, they all constitute but one in the division.

4. Is the executor entitled to commissions over and above his legacy? We think he is. There is no intimation that the legacy was given in satisfaction, or in lieu of commissions.

5. If the widow is entitled to a distributive share, must Zachary Windley and Jerusha Allen bring in their advancements before they can take any part of the residuum? We can see no ground for requiring them to bring in their advancements, as a condition precedent to taking a share in the residuum. What was given to them by deeds of gift, stands in this respect, on the same footing with what is given to the others under the will.

Per Curiam. Decree accordingly.

JOSEPH GREEN *against* SUSAN C. CAMPBELL AND OTHERS.

A non-resident who has no property or effects within this State, will be restrained by an injunction from collecting a bond given for a tract of land, to which he had no title, notwithstanding the purchaser has a cause of action at law upon a covenant of warranty.

Where a deed has been filed as an exhibit in a cause, and its execution has been admitted by the pleadings of the opposite side, it is too late to object to the sufficiency of the probate and registration, for the first time, on the trial of the cause.

Cause removed to this Court from the Court of Equity of Brunswick County.

The defendants, Susan C. Campbell, now Susan C. Whitney, and her sisters, Ida N. Moore, and Selina M. Moore, conveyed to the plaintiff five tracts of land, lying in the County of Brunswick, with a general warranty of title, at the price of $4200. He paid in cash $1000, and gave his notes for $1000, payable at the end of one year; $1000, payable at the end of two years; and $1200, at the end of three years. The first two of these notes were paid, but the other, not being paid, was put in suit, and, at the commencement of this suit, was about to be collected by execution.

To one of the several tracts conveyed to plaintiff, to wit, that described as lying on Bull-head branch, the defendants had no title, but, at the date of the deed, was openly held, and adversely possessed, by one having a valid title thereto.

The defendants removed from the State in 1834, and have constantly, since then, resided in a distant State, and they had not, at the commencement of this suit, any property or effects within the jurisdiction of the Courts of this State.

The prayer of the bill is for an injunction to restrain the plaintiff from collecting so much of the $1200, as is equal to the value of the land thus lost to him, which he says is $1000; and for general relief.

The defendants, in their answer, allege that they inherited from their ancestor, Alfred Moore, several tracts of land, lying in the County of Brunswick, contiguous to each other,

called *Springfields*, but as they removed from the State many years ago, and have never since visited it, they were entirely unacquainted with the particulars concerning these lands; that for the purpose of making sale of their real estate in this County, they employed a gentleman residing in a neighboring County, who was also unacquainted with these particulars; that this gentleman, as their agent, contracted with the plaintiff to sell him these lands, but before doing so, instructed him to call on several persons who were well acquainted with the localities, boundaries, and all the particulars concerning them, which, they say, he did, so that he was much better acquainted with the lands than they were or their agent; that the bargain was made in reference to the Springfields only, and these lands were fully worth the sum agreed on as the consideration of the deed, to wit, $4200; that this land called the Bull-head tract, was not a part of the Springfields, but was at least six miles distant from them, and they had never pretended to set up title to it; that this tract on the Bull-head branch was, at that time, in the possession of William S. Ashe, who claimed and owned it under a valid deed from Miss Sally Moore to Hasell Burgwin, and from him to said Ashe, and that all this was well known to the plaintiff, but unknown, at that time, to the defendants, or their agent; that the defendants' agent, acting upon information which he derived from the plaintiff, prepared a deed, including this tract with the Springfields, and sent it to them, (then resident in the District of Columbia). This deed they executed without the least knowledge that they were conveying any other than the lands they were entitled to; but, they aver, that the plaintiff was fully aware of this mistake, and designedly led their agent into it to defraud them of a part of the money which he was to pay for their property.

They also aver that the plaintiff well knew that William S. Ashe was living on the Bull-head-branch tract, claiming it under a valid title, and that he was only buying a lawsuit in taking a deed for it. They insist this was maintenance in the plaintiff, and that he has no right to relief on that account.

They insist that, as the plaintiff has a complete remedy at law for a breach of the covenant of warranty, he is not entito the relief prayed for.

An exception was taken in this Court, for the first time, to the probate of the deed exhibited by the plaintiff, but as the Court thought it had been waived by the pleadings, it is not deemed necessary to state it.

There were replication to the answer, commissions and proofs, and the cause being set down for hearing, was sent to this Court.

London and *Strange*, for plaintiff.
Moore, for defendants.

Battle, J. The bill could not be sustained were the defendants within the jurisdiction of the courts of law of this State, for the reason that the law could give complete relief in an action of covenant on the warranty contained in the deed of defendants; but as they are non-residents, and have no property within the State, this Court will not permit the defendants to recover the purchase-money for the land, the title to which is admitted to be defective, leaving to the plaintiff the precarious remedy of suing in the courts of another State for the purpose of getting back the same by way of damages, in an action for the breach of the covenant of warranty.

But it is insisted for the defendants, that the plaintiff has no right to any relief in this Court, because he himself fraudulently procured the tract of land in question, to be inserted in the deed executed to him by the defendants, he himself knowing at the time, that he had purchased only the four other tracts mentioned in the said deed. If the allegation of this fact were sustained to our satisfaction by the proof, it would furnish a complete answer to the equity set up by the plaintiff. But the testimony of the witness *Flowers*, which alone tends to support it, is too much weakened by that of the witness *George Greene*, to be allowed to affect the rights of the plaintiff as evidenced by the deed of the defendants.

But they object, that the deed cannot avail the plaintiff for any purpose, because it was not admitted to registration upon a proper probate and order. This objection is not open to the defendants to be taken, for the first time, in this Court. They have, in their answer, admitted the execution of the deed in question, and a copy of it has been filed by the plaintiff as an exhibit, and has been transmitted to this Court, as a part of the testimony in the cause. It would be taking the plaintiff by surprise, if, under these circumstances, such an objection were permitted to prevail.

The testimony does not support the defense suggested, rather than relied on, in the answer, that the contract of purchase was void, because it was infected with maintenance. It does not appear that the plaintiff had any knowledge at the time he took the deed, that any person was in the possession of the land in question, claiming it adversely. The cases of *Deaver* v. *Eller*, 7 Ire. Eq. Rep. 24, and *Barnes* v. *Strong*, 1 Jones' Eq. Rep. 100, referred to by the defendants' counsel, do not apply. The first decides merely that a Court of Equity will restrain, by injunction, the assignor of an equitable claim from dismissing a suit at law, brought by the assignee, in the name of the assignor. The second is a case of rank champerty, where a son was to have half of the amount in controversy, upon the successful defense of a suit for an aged and infirm father.

Our opinion, therefore, is, that the plaintiff is entitled to have a perpetual injunction as to a part of the purchase-money; which part is to be ascertained by comparing the value of the land in dispute at the time of the purchase, with that of the other tracts purchased by the plaintiff, the title to which is good, supposing the whole to be worth the amount mentioned in the deed; and to ascertain this comparative value, there must be a reference.

It is manifest, from the proofs on file, that the injunction heretofore granted is for too great an amount, and it must be dissolved for the sum of $400, with the interest thereon since the

note became due; and the cause will be retained for further directions.

PER CURIAM. Decree accordingly.

JOSEPH T. FLIPPIN AND OTHERS *against* LEWIS B. BANNER, EX'R., AND OTHERS.

Where, from the provisions in a will, it was manifest that the testator intended to establish entire equality between his children, such purpose is not varied by changes, subsequently made by the testator, in dispositions by deed of certain parts of the property; and those taking under the deeds subsequently made, will be put to their election.

CAUSE removed from the Court of Equity of Stokes County.

The bill was filed by the plaintiffs, as legatees under the will of Samuel Flippin, against the defendant, as executor, praying a decree for an account and payment of their legacies. The other defendants are also legatees; and the Court is further asked to declare in what proportions the several legatees shall take under this will. The bill sets forth the following clauses as material to the questions submitted to the Court.

After making provision for his wife, the will contains the following:

"Also, I will and bequeath to my daughter Mary A. Atkinson and her heirs, one tract of land lying west of Flippin and Banner's mills, the tract whereon Presley George now lives, containing 150 acres, more or less, named to her in a deed heretofore at $225. Also I will and bequeath to my dear daughter M. A. Atkinson, the tract of land whereon the said Atkinson now lives, to run with a certain ridge-road leading from Edmund Wallers to George Rogers, all the land I own on the east side of said road, valued to her at $250. The last lot of land spoken of is lying in Patrick County, Virginia, on the waters of Peters' creek.

"Also, I give and bequeath to my son Joseph T. Flippin, a

certain piece or parcel of land, it being a part of the land willed to Mary A. Atkinson, the land whereon the said Joseph T. Flippin now lives; beginning at the upper north side of said Flippin's plantation, at a marked tree that I marked some years ago, &c., I have heretofore deeded; valued at $600.

"Also, I will and bequeath to my son John C. Flippin, a certain tract of land of 413 acres, which land I have lately deeded to him; valued at $600.

"I also will and bequeath to my son Rawley W. Flippin, a tract of land, whereon he now lives, lying and being in Patrick County, Virginia, on the waters of Peters' Creek, the upper and north end of the said old tract, valued at $400.

"Also, I will and bequeath to my son Samuel M. Flippin, the tract of land, whereon he now lives, which land, I made him a deed to not long since, and valued at $800, it being the east end part of the Lyon old tract.

"Also, I will and bequeath to Nancy M. Banner, a certain tract of land, known as the old Brickhouse tract, adjoining the lands of Henry Pell, Jesse McKinney and others, which land, I made her a deed to not long since, containing 294½ acres, more or less, valued at $600.

"Also, I will and bequeath to my daughter Martha J. George, a certain piece of land, being the west end of the old Lyon tract, containing 552 acres, more or less, which land, I have lately deeded to Martha J. George and Presley George, valued at $800.

"Also, I will and bequeath to my daughter Leah W Francis, a certain piece of land, to wit, beginning, &c., number of acres not known, though I value said tract at $800."

After some bequests of personal property to the plaintiff, Joseph T. Flippin, the will contains as follows: "In short, I only hold him bound, on a settlement, with the remainder of my heirs, for the valuation of his land, to wit, for $600."

In the devise to John C. Flippin, after a bequest of personal property, the will contains the following language: "I on-

ly hold him bound, on a settlement, for the valuation of his land, to wit, $600."

In the devises to his other children, although a value is fixed for each tract, the will omits to provide that the legatees shall account with his estate upon a settlement.

The will further contains the following devises of real estate: "Also, I wish this boundary, together with the mills, to be sold at my death, and the money to be equally divided between all my lawful heirs, to wit, beginning, &c."

"Also, the tract lying east of the mills, I want sold at the same time and place as the mills, and the money equally divided as heretofore mentioned."

The testator also loaned certain lands to his brother John Flippin for life, and after his death, to be sold and the money equally divided among *his heirs.*

Lands were also given to his wife for her life, and after her death, they were directed to be sold and the money divided in like manner.

The personal estate by this will, is disposed of as follows: "Also, I will and bequeath that all my negroes, not loaned to my wife Mildred, be allotted and equally divided between my lawful heirs.

"Also, all the property, not otherwise disposed of, to be sold, and all debts due me to be collected and just debts paid, the remainder of money, if any, be equally divided between all my lawful heirs."

The will also directs that, after the death of his wife, the slaves and other property loaned to her be sold, and the money divided between his lawful heirs.

The will was made in 1847, and the testator died in 1852. In the interval between these dates, he made various changes in the above dispositions of his property; that is to say, the tract of land given by the will to Mary A. Atkinson, valued at $225, he conveyed by a deed of gift to Nancy Banner, together with the two tracts of land directed to be sold, and his (testator's) interest in the mills; which several parcels of land, with his interest in the mills, were valued by him at $800.

The tract given to Mary Atkinson, valued at $250, was conveyed, by deed of gift, to the plaintiff Rawley W. Flippin, together with that willed to him, and valued at $450, which valuation to R. W. Flippin, amounts to $700. The tract of 294 acres, valued to Nancy M. Banner at $600, was conveyed in like manner to Mary A. Atkinson, at the value of $600.

Martha J. George, one of the legatees above mentioned, died in the life-time of the testator, leaving her husband, Presly George, and one child, Robert W. George, surviving her, who are both made defendants.

Mary Atkinson also died in the life-time of the testator; her husband administered on her estate, and he, together with her children, are plaintiffs.

It is alleged by the plaintiffs, that the purpose and intention of the testator in the various dispositions of his estate by the will as well as by the deeds, was to establish entire equality among his children, and that he contemplated a general aggregation of his property, real and personal, and a contribution of the excesses to the deficiencies; they allege that, this equality was intended to be effected when the residuary fund might be divided, and that this fund, being quite large, is sufficient to cover all these inequalities, and still leave a residuum to be equally divided among the children.

They insist that if the defendants, or any one of them, shall refuse to bring in the advancements made them by the deeds of gift, that they be excluded from any benefit under the will, and be compelled to elect how they will claim.

The prayer is for an account and settlement of the estate upon the principles set forth by the plaintiffs. Joseph T. Flippin, John C. Flippin, Rawley W. Flippin, Braxton Atkinson, as administrator, and the children of his deceased wife, Mary, are the plaintiffs.

Lewis B. Banner, as the executor, and as legatee with his wife, Mary, under the will, and as donees under the deeds of gift, Samuel M. Flippin, John J. Francis, and his wife, Leah, Presley George, the husband of Martha J., and Robert W., his child, are made defendants. They all answered.

There were replication, commissions and proofs; and the cause being set down for hearing, was sent to this Court.

Morehead, for plaintiffs.
Miller, for defendants.

Battle, J. No person can read the will, upon the construction of which we are called upon to give an opinion, without being at once impressed with the idea that the testator intended to make an equal division of his estate among his children. This could not well be done with regard to each particular species of property; but it is manifest that he intended that whatever inequalities there might be in the distribution of any one kind, should be corrected in the division of others. It was with that view, that he mentioned each tract of land which he had given to his children respectively, and fixed upon the sum at which it was valued; and to prevent all doubt that such was his object, he declares in a subsequent part of his will, after a bequest of some personal property to his son Joseph, that he was only to be "bound on a settlement with the remainder of the heirs for the valuation of his land, to wit, $600." A similar clause is inserted in relation to his son John; and the same declaration must, we think, be implied in the respective devises to the other children. The intention, so apparent, for an equal provision for all the children, is not in the least degree varied by the changes subsequently made by the testator, in the disposition, by deed, of certain portions of his land among some of them; and, we think, they cannot disappoint that intention by electing to claim partly under their deeds and partly under the will. The principle of the doctrine of election is, (as we have had occasion to say in the case of *McQueen* v. *McQueen*, ante 16,) that "one who takes a bounty under an instrument, is under an obligation to give effect to the whole instrument; or rather, that the donor intended that he should not enjoy that bounty, if he disappointed that bestowed on another in the same instrument." Adams' Eq. 93. All the defendants who are of full age must,

therefore, be held to elect whether they will claim under or against the will. As to the defendant Robert W. George, who is an infant, there must be a reference to the master, to enquire and ascertain the value of both interests, and then the Court will direct what election shall be made for him. See *McQueen* v. *McQueen*, above cited, and the cases there referred to.

PER CURIAM. A decree may be drawn in accordance with this opinion.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1856.

JOHN BURGESS *against* G. W. LOVENGOOD AND OTHERS.

If a verdict be obtained in a Court of Law by fraud, circumvention, or perjury, a Court of Equity may decree that the party shall consent to give his adversary a new trial in the same Court of Law.

But allegations that a certificate for a pre-emption right was obtained from the commissioners of Cherokee lands, by perjury, without specifying the particular perjury, and from a mistake by the commissioners, both in respect of the law and facts, are not sufficient to authorise the interference of this Court with the action of the commissioners.

Whether, under the Act of assembly appointing commissioners to settle claim of Cherokee lands, they are not in the nature of arbitrators, and whether in any instance, this Court could interfere to review their judgment, *quære*.

CAUSE removed from the Court of Equity of Cherokee County.

The Legislature, at its session of 1850, passed an act entitled "An Act to authorise the sale of refused lands owned by the State, in the Counties of Macon and Cherokee." The purpose of this act was, among other things, to secure pre-emption rights to first settlers, and to those who had made

valuable improvements upon lands occupied by them. By this act the Governor of the State was authorised to appoint, and did appoint, three commissioners, whose duty and office it was, amongst other things, to hear and determine pre-emption claims, and to award certificates to such as might be entitled to such rights. The board of commissioners thus authorised and appointed, shortly afterwards held their session at the town of Murphy, in the County of Cherokee.

The plaintiff, in his bill, alleges, that among other claims, that of the defendant Amos Carden, for the land which is now in controversy, was submitted to the board; that he claimed as the assignee of his brother, the defendant Alfred Carden, who, it was alleged, had made valuable improvements; that he pretended that, when he went off, he left property in the house to enable him to keep the possession, and that he intended to return; that Alfred was a resident of Tennessee, and he professed to have sold to his brother Amos; that these allegations are wholly untrue; that the defendant Alfred had made no such improvement; that all he did towards improvement was to go into an old Indian hut for about two months, put up a few old rails, and plant a small patch of corn on land that had been cleared by the Indians; that he did not go off with the purpose of returning, nor did he leave any article of personal property in the hut to signify such intention, and that there was no evidence as to these allegations except the oath of Alfred Carden, who, in swearing in their support, committed gross perjury; that both the Cardens are now, and have been, generally, citizens of the State of Tennessee; that the board of commissioners were mistaken in their views of the law, and as to the nature of their duties, and were imposed on, and mistaken as to the facts; that the defendant Amos, not having the possession, nor the right of possession, was not entitled to have the certificate issued to him; that the first substantial improvement made on the land in question, was by one Reuben Breeden, who settled on the same, and made permanent and valuable improvements thereon; that, when he went off, his possession was transferred to one

Singleton Rhea, to whom he assigned his interest by a written instrument; that S. Rhea assigned in writing to P. M. Rhea; he to Richard Roberts; and he to plaintiff; that these transfers were for valuable considerations, and *bona fide;* and that possession has been continued from Bredeen down to plaintiff; a period, amounting in all, to about thirteen years; that the plaintiff was unable to show the commissioners how the facts were, his witnesses being partly out of the State, and there was no mode of enforcing their attendance, or of procuring their testimony; that the board of commissioners being thus imposed upon by fraud and perjury, and being thus mistaken in the nature of their duties, under the Act of Assembly, wrongfully and unjustly awarded the certificate to the said Amos Carden, who shortly thereafter sold and assigned the same to the defendant G. W. Lovengood, who assigned the same to the other defendant, his son, Drury Lovengood, to whom a grant for the land has issued; that both these last named defendants had notice of the equity of the plaintiff when they took such assignments. The bill further charges that the grantee, Drury Lovengood, has obtained a verdict and judgment in the Superior Court of Cherokee, and threatens to turn plaintiff out of possession.

The prayer is for an injunction, and for a conveyance; also for general relief.

The answer of the defendants denies the several allegations contained in the plaintiff's bill, and insists that the transaction was really and truly as represented to the commissioners by Alfred Carden; and that the certificate properly issued to his assignee, who sold it *bona fide*, and without notice of any such equity as set forth, to G. W. Lovengood, who likewise, without any such notice, sold it to the other defendant, Drury Lovengood.

An injunction had been obtained upon the plaintiff's bill, which, at Fall Term of the Court below, upon the coming in of the answer, was dissolved, and the bill continued as an original.

There were replication, commissions and proofs taken; and

the cause, being set down for hearing, was sent to this Court.

J. W. Woodfin, for plaintiff.
Baxter, for defendant.s

Pearson, J. In *Evans* v. *Lovengood*, 1 Jones' Eq. Rep. 298, (which is a branch of this case,) it is said "the only ground upon which the plaintiff's equity can be put, is that fraud was practiced upon the commissioners, and their certificate obtained by perjury." The case was then before us upon a motion to dissolve the injunction, and went off upon the ground that the defendant Lovengood was a purchaser for a valuable consideration without notice. Of course we were not then at liberty to decide whether the plaintiff had been successful or not, in putting his case upon the only ground which was supposed to be tenable. The case is now up for final hearing, and we are satisfied that the plaintiff has failed to establish an equity, both for the want of the averments necessary to put the case upon the ground alluded to, and for the want of the necessary proof; so, he fails both upon the *allegata* and *probata*.

The cases of *Fentress* v. *Robbins*, N. C. Term Rep. 177, *Peagram* v. *King*, 2 Hawks. Rep. 295, Ibid. 605, *Deaver* v. *Erwin*, 7 Ire. Eq. Rep. 250, *Dyche* v. *Patton*, 8 Ire. Eq. Rep. 296, recognise the general doctrine that, if a verdict be obtained in an action in a Court of common law by fraud, circumvention, or perjury, a Court of Equity may decide that the party shall consent to set aside such verdict, and have the matter tried *de novo* in a Court of common law; in other words, a Court of Equity may require the party to give his adversary a new trial. But it is agreed that this power should be exercised with "extreme caution," and the application of the doctrine is greatly restricted, and is confined to cases which present "peculiar circumstances," under the maxim, "there must be an end to litigation."

For instance, the doctrine does not apply if the Court be

misled, and from ignorance, or other cause, mistake the law; for Equity cannot review the judgments of Courts of Law. So, it is agreed that the doctrine only applies where there is *new matter*, or something discovered after the trial at law, and which could not have been made available either on the trial, or as a ground for a new trial, in that Court. So, it is agreed, that to set aside the verdict on the ground of its being obtained by perjury, there must be an allegation that the party who used the testimony *knew it to be false*. So, there must not only be newly discovered evidence, but such evidence must bear directly upon the merits of the case, and must be decisive of it, and not tend simply to impeach the testimony of a witness at a former trial, or to add cumulative evidence as to a matter before controverted. In this connection we will remark that *Peagram* v. *King* was decided at a time when, according to *McFarlane* v. *Shaw*, 2 Car. L. Rep. 102, the dying declarations of the witness *Jenks* was evidence in chief, and not merely evidence to impeach.

In *Terry* v. *Young*, Pre. in Ch. 193, the Lord Keeper declared "the relief must be grounded upon new matter, and not what was tried before. When it consists in swearing *only*, I will never grant a new trial unless it, (that is, the falsehood,) appear by *deed* or *writing*, or that the witness, upon whose testimony the verdict was given, *has been convicted of perjury*." Accordingly, in *Peagram* v. *King*, which is the only case in which our Courts have applied the general doctrine, (as it is termed,) this qualification is assumed to be correct; and the Court treat the fact of the death of the witness *Jenks* before a prosecution could be instituted, as bringing the case within the reason of the decision.

In our case there are no averments to meet these several qualifications and restrictions of the rule. The bill does not disclose, with any kind of distinctness, the particular falsehood upon which the commissioners were induced to award the certificate to Carden. Whether Carden had made "valuable improvements" within the meaning of the statute, involved a question of construction, as to which, it is not now insisted that the

Court can review the judgment of the commissioners. It is not alleged that any new matter was discovered, and the plaintiff relies upon the general allegation that the testimony upon which the certificate issued was false; but he was unable to prove it, because there was no way of getting his witnesses before the commissioners; and upon the further general allegation, that both the Cardens "were, are now, and have been, generally, citizens of the State of Tennessee."

It is useless to consume time by going into particulars, for the purpose of showing that such general allegations cannot make a case to which the doctrine, as to the interference of Courts of Equity with verdicts and judgments in the Courts of Law, is applicable. It is also useless to refer to the evidence, except to remark that no particular falsehood is proved, either by *deed*, *writing*, *or conviction of perjury*, or in any other way, except by proof of general admissions and conversations of the parties, deposed to by witnesses who, themselves, appear under very questionable circumstances.

So far, we have treated the case as if the application for a new trial was in reference to the verdict and judgment of a Court of Law; but in our case, the proceeding was before three commissioners, who were appointed under the statute, to act in the nature of arbitrators in awarding certificates, which should entitle the party to a pre-emption right. No appeal, or other mode of reviewing their decision, is provided; and the object of the Legislature seems to have been to make their action final in regard to the very many controversies and disputes which it was anticipated would grow out of the unsettled condition of things in the County of Cherokee. So that it might be a matter of grave consideration, whether the doctrine in regard to proceedings in the ordinary Courts of Law is applicable to their awards. It is very certain that the mode of relief, that is, to require the parties to set aside the judgment and verdict at law, and try the matter *de novo* before the same Court, is not applicable; because the commissioners are *functi officio*, and the matter cannot be tried over again before them. A Court of Equity could only interfere by sub-

stituting itself as the tribunal for the settlement of the question controverted by the parties; which presents a very serious objection to the assumption of such a jurisdiction.

PER CURIAM. Bill dismissed.

JOHN JONES *against* ELIJAH KINGSEY.

Where the mortgaged premises were sold under a prior lien, and bought by a third person, who sold again to the mortgagor, the rights of the mortgagee are not impaired by this transaction; so far from it, it will be regarded only as the removal of an incumbrance, which it was the duty of the mortgagor to effect.

CAUSE removed from the Court of Equity of Henderson County.

The defendant, being indebted to the plaintiff in the sum of eleven hundred and thirty-six dollars, ($1136,) executed a mortgage-deed of a certain tract of land, described in the pleadings, to secure the payment thereof. At the end of the time stipulated for the payment, the money being unpaid, except $400, this bill was filed for a foreclosure of the equity of redemption; or, in the alternative, for a sale of the mortgaged premises.

The answer of the defendant sets forth that, shortly after executing the mortgage-deed to the plaintiff, he discovered there was a judgment and execution outstanding in the County Court of Henderson county, wherein the defendant was surety of another person, which formed a prior lien to the mortgage-deed, of which he was not aware at the time of executing the deed; that he made known the fact to plaintiff immediately afterwards, and he (plaintiff) promised to advance the necessary funds to remove this prior incumbrance, and look to the mortgage-deed as security for this further sum also; but the plaintiff failed to perform this promise, and permitted the property to be sold under the execution.

He alleges further, that at this sale, one Michael Francis,

became the purchaser of the premises, and that he bought them back from Francis; that Mr. Francis did not purchase as his agent, or by any privity or understanding with him, and that there was paid a *bona fide* consideration, and he took an assignment to himself and his wife, of the deed which the sheriff had made to Francis. The consideration expressed in this assignment is $100. The surplus of the money, after satisfying the small execution, under which the land sold, ($400,) was paid to the plaintiff upon this debt.

The defendant insists that, as plaintiff, against his promise, permitted the land to be sold, and as the purchaser at that sale, bought it *bona fide*, and as he bought it back from Francis *bona fide*, and not in pursuance of any previous arrangement or understanding, the plaintiff is not entitled to the relief which he seeks in his bill.

There were replication to the answer, commissions and proofs; and the cause having been set down for hearing, was sent to this Court by consent.

N. W. Woodfin, for plaintiff.
Baxter, for defendant.

Battle, J. This is a bill of foreclosure, in which the prayer is in the alternative, for a sale of the mortgaged premises; or that the defendant's equity of redemption may be foreclosed. The answer admits the mortgage, and the debt for which it was given. The only defense set up is, that at the time when the mortgage was executed, there was an outstanding judgment and execution which were unknown to the parties; that the defendant as soon as he ascertained the fact, informed the plaintiff of it, who then promised to pay off the judgment debt, and thus remove the encumbrance, which, however, he neglected to do, and the land was sold under execution, and purchased *bona fide* by one Michael Francis, who paid and took the sheriff's deed for it; that the plaintiff received about $400, the overplus after paying off the said execution and costs; and that the said Francis had, subsequently, upon be-

ing repaid his purchase-money, conveyed the land to the defendant and his wife; or at least, had contracted to do so. The defendant contends that these transactions are a bar to the plaintiff's claim. The defendant has filed, as an exhibit, the deed from the sheriff to Francis, upon which is endorsed a valid conveyance from him to the defendant and his heirs, for the said land, reciting as a consideration therefor, the payment to him of one hundred dollars. The answer does not state by whom this consideration was paid; but in the absence of any allegation and proof to the contrary, we must presume that it was paid by the defendant himself.

The case then is simply this; that there was an encumbrance upon the land at the time when the mortgage was made, which was unknown to both parties, and that the defendant has since removed it, as it was his undoubted duty to have done. No argument can make the plaintiff's right to the relief which he seeks, plainer than it is made by the bare statement of the facts. There must be a decree that unless the defendant, within six months after being served with a copy of the decree, shall pay to the plaintiff the residue of the mortgage debt, the clerk of this Court shall, after due advertisement, proceed to sell the mortgaged premises for the payment of said debt; to ascertain which, if necessary, there must be a reference.

PER CURIAM. Decree accordingly.

BENJAMIN ELLIS *against* JAMES B. DAVIS, J. B. BORDLY, AND C. C. DURHAM.

Where equities are equal the law prevails; but if the party having the right at law acquires another interest inconsistent with his equity, so that he cannot honestly claim both, his equity is impaired, and the rule, *qui prior est in tempore, potior est in jure*, prevails,

This was a cause removed from the Court of Equity of Cleaveland County.

The facts of the case are sufficiently stated in the opinion of the Court.

Lander and *Avery*, for plaintiff.
Guion, for defendants.

Pearson, J. On the 11th of October, 1851, the plaintiff executed to the defendant Davis, a deed for lot No. 5, in the town of Shelbyville, with warranty, in consideration whereof, Davis gave to the plaintiff two promissory notes, one for $29,73, payable twelve months after date, the other for $66,-47, payable two years after date. At the time of this transaction, the plaintiff owned lot No. 6, but did not own lot No. 5, and the deed for the latter, instead of the former, was made by *mistake*.

On the 12th of October, 1851, Davis executed to the defendant Durham, a deed for lot No. 5, in consideration of the sum of $80, as recited in the deed, of which $25 was cash, and the balance a credit on a store account. In November, 1851, Davis executed to plaintiff, a mortgage-deed for lot No. 6, to secure the payment of his two notes, which was duly registered in April, 1852; this deed is dated 11th October, 1851, but was ante-dated, to correspond with plaintiff's deed to Davis. On the 30th of January, 1852, plaintiff executed to Davis a deed for lot No. 6; it recites a consideration of $96,20, and was given in substitution for the deed to lot No. 5, which, it was then discovered, had been made by mistake, and nothing was, in fact, paid, except the two promissory notes. On the 3rd of December, 1852, Davis executed to Durham a deed for lot No. 6; it recites a consideration of $96, but nothing was, in fact, paid, except what had been paid for the consideration of the first deed.

The plaintiff alleges that it was a part of the agreement between himself and Davis, in the contract of sale, that Davis was, at the time the deed was executed, to secure the pur-

chase-money by executing a mortgage for the lot; and that Bordly, the other defendant, who drew the deed and the notes, commenced drawing a mortgage, but did not finish it, pretending that he did not know the form, and thereupon, it was agreed that the whole matter should stand over until they could get some one who did know the form; but that, being intoxicated, (which may account for the mistake as to the No. of the lot,) he let Davis take the deed, and he took Davis' notes, with the understanding that the papers should have no force or effect until the mortgage was executed, so that the whole agreement might go into effect at the same time. He also alleges that Durham took the deed from Davis, with notice that Davis was to make a mortgage, before the deed of plaintiff should have effect; and he insists, that after the mistake had been remedied by his deed to Davis, and Davis' mortgage to him, and Davis' deed to Durham, for the proper lot, No. 6, that Durham ought, in conscience, to have surrendered up the two deeds for lot No. 5, and agreed to have them cancelled. On the contrary, he alleges, Durham refuses to cancel the deeds, and has taken possession of lot No. 5, as well as of lot No. 6, with an intention, when he is evicted by the owner of lot No. 5, to bring suit against him on his warranty in the deed to Davis for that lot. The prayer is to have the deed cancelled.

The defendant Davis denies that it was a part of the agreement that he was to execute a mortgage to secure the purchase-money. He admits that he had no property, and was in debt; in fact, he says, that the day after he got the deed from the plaintiff, he heard that one of his creditors intended to have his lot levied on and sold, and for that reason he sold to the defendant Durham; but he positively denies that he intended to commit a fraud upon the plaintiff.

The defendant Durham admits that Davis was insolvent; but he says, when he found that Davis had a deed for a lot which he then supposed was the lot which had belonged to plaintiff, he concluded to save his debt by advancing to Davis $25 in cash, and giving him credit for the balance. He denies that

Davis was to secure the payment of the purchase-money to plaintiff, by a mortgage, to take effect when the deed was executed by the plaintiff; at all events, he avers, that if such were the fact, he had no notice of it when he took the deed from Davis; and he insists, that having innocently acquired a legal right, under the deed, by which he can avail himself of the plaintiff's warranty, if he is evicted from lot No. 5, his equity being equal to that of the plaintiff, this Court should let the law prevail.

The defendant Bordly disclaims all interest in the matter; says he drew the writings, as the friend of both parties, without compensation; that he heard nothing of a mortgage. He admits that Davis "owns no property; but he has a good trade; is a young man, and able to work."

We are satisfied, from the proofs, that it was a part of the contract, that Davis should, at the time the deed of the plaintiff was executed, make a mortgage, so as to secure the purchase-money; and that it was a surprise upon the plaintiff, amounting to a direct fraud, for Davis to take the deed, without, at the same time, executing the mortgage. Plaintiff knew that Davis had no property, and was in debt, and under these circumstances, for him (plaintiff) to agree to make a deed to Davis, and take his notes at *one and two years credit*, without a stipulation for a mortgage, would be conclusive proof that he was too drunk to know what he was doing.

From the proofs and circumstances, there is some ground to suppose that Durham had reason to believe that Davis was to have executed the mortgage; but it may be that he was under the impression that the plaintiff had taken some other security for the purchase-money; and the proof does not fully justify a declaration of the fact that he knew that there was to be a mortgage; although we must say, he stands in a questionable shape in respect to this allegation; and high morality would forbid his insisting upon a legal right to take advantage of a mistake on the part of the plaintiff, and a fraud on the part of his co-defendant, Davis.

It is a well-settled doctrince of this Court,—"Where the

equity is equal, the law prevails;" and the question is, has Durham an equal equity with the plaintiff, so that this Court cannot interfere with his legal rights in regard to the deed for lot No. 5?

If there had been no mistake, and the first deed had been properly made for lot No. 6, and the plaintiff had allowed Davis to take it, with the understanding that it was to be of no effect until the mortgage was executed to secure the purchase-money according to the contract of sale, and Davis had, in fraud of this agreement, on the next day, executed a deed to Durham, the latter, having acquired the legal title, would not have been prevented from availing himself of it, to save himself from loss by the fraud of Davis; the question being, whether he or the plaintiff must lose by that fraud; for the doctrine that a vendor has a lien for the purchase-money, although it still has the sanction of the Courts in England, is not acted on here.

After the mistake was discovered, the plaintiff, by executing a deed to Davis for the right lot, did as much as he could to correct it, and carry out the original agreement. As between the plaintiff and Davis, the effect of this was to transfer the notes of Davis, from the deed for lot No. 5, and make them the consideration for the deed for lot No. 6. This left the former without any consideration, and imposed on Davis an obligation to cause it to be surrendered, so as to relieve the plaintiff from any liability under it. If he were not able to do so, of course, he could not, in common honesty, take benefit of the equity of redemption in lot No. 6, which he had acquired under the latter deed.

Had Durham been content to stand upon the deed for lot No. 5, his rights would not have been affected by what had been done by plaintiff and Davis; his equity would have remained unimpaired, and being prior to the equity of the plaintiff, there would have been no ground for interfering with his legal right. But he did not choose to do so; he takes from Davis a deed for lot No. 6; this he could not honestly do, without agreeing to surrender the deed for lot No. 5; for,

otherwise, he makes himself *particeps criminis* with Davis, in putting in use the deed for lot No. 6. The effect of it was, that Durham acquired the equity of redemption; and to give the deed a consideration, it was necessary to transfer to it, the consideration which had been paid for lot No. 5; otherwise Durham would acquire rights to both the lots, for one and the same consideration. This left the deed to Durham for lot No. 5, without consideration, and so impairs his equity, that it is not equal to that of the plaintiff. He cannot pretend that when, *for his own gain*, he induced Davis to attempt this second fraud, he was ignorant of the plaintiff's prior equity; and the rule then is, *qui prior est in tempore, potior est in jure.* "There is no one quality so well wove in warp and woof, but there is some flaw in it. I have known a brave man flee a shepherd's cur, and your cunning, worldly-seeking man doth oft-times weave his web so fine, *as to ensnare himself.*"

The plaintiff is entitled to a decree against Davis and Durham. The bill must be dismissed as to Bordly; but without costs, because of the unfairness of his answer.

Per Curiam. Decree accordingly.

BRANCH H. MERRIMAN *against* ROBERT RUSSELL *and others.*

The words, "so much of my land lying, &c., as will conveniently carry water to a saw-mill, so as to be his profit and advantage," contained in a deed, convey no interest in the soil, but an easement or privilege to have sites for a race and mill-dam, and to pond back the water, with the right of ingress and regress to repair, &c.

And without words of inheritance, such a right is, by construction, given so long as the grantee and his heirs and assigns may wish to run the mill.

Where the assignee of the grantor in the above deed, tore away the dam at the head of the race, and filled up the race theretofore laid out and used, and ploughed over it, so as to efface the limits of it, against the remonstrances of the grantee, Equity will grant relief by issuing a commission to re-mark

the site of the race, &c., and also order an account for the loss of profits. This equity is under the head of a "confusion of boundaries."

CAUSE removed from the Court of Equity of Henderson County.

The facts of the case are sufficiently reported in the opinion of the Court, except the following deed, which, being the subject of construction, it is deemed important to set out at large, viz: "Articles of agreement entered into between Samuel Jenkins, sen'r., of the one part, and William R. Gash, of the other part, both of the County of Buncombe, and State of North Carolina, witness, that for and in consideration of the sum of one dollar, I have bargained and sold so much of my land lying on Hooper's creek, in the County and State aforesaid, as will conveniently carry the water to a saw-mill, so as to be to his profit and advantage; in testimony whereof we have hereunto set our hands and seal, this 10th day of March, in the year of our Lord, 1836." Signed by both parties, and delivered by Jenkins to Gash.

N. W. Woodfin, for plaintiff.
Baxter, for defendants.

PEARSON, J. The plaintiff claims, as assignee of Wm. R. Gash, under a deed executed by Samuel Jenkins, dated March 10, 1836. The deed must be construed in reference to the purpose for which it was made. That appears upon the face of it to have been to enable Gash to operate a saw-mill, which he was about to erect, by carrying the water over Jenkins' land. Restrained by this rule of construction, the words "bargained and sold *so much of my land*, &c., as will conveniently convey the water to a saw-mill, so as to be to his profit and advantage," do not amount to a conveyance, or an agreement to convey any part of the *land* of Jenkins; because it was not necessary for the purpose for which the deed was made, that any part of the land should be conveyed to Gash; while, on the other hand, if a strip of land passing through a

tract, becomes the property of another, it might subject the owner of the tract to much inconvenience and loss. For instance, if Gash became the owner of this strip of land, although he and Jenkins would not, in all probability, ever have any difficulty about it, yet it would pass into other hands, and those claiming under Gash, would have title "up to the Heavens, and down to the centre of the earth," and could prevent those claiming under Jenkins from making a *bridge over* the race; because it would "break his close" and *pass over* his land, and thus prevent access from one part of a field to the other. Without multiplying instances, this is enough to show that it was not the intention of the parties, although the word *land* is used, to pass the land itself; and the proper construction of the deed is to give to it the legal effect of vesting in Gash a right to cut the race, to put a dam across the creek, and to back the water so as to turn it into the race. This right, privilege, or easement, together with the right of ingress and regress, as often as it was necessary to clean out and repair the race and dam, (which, of course, would be implied,) is all that it was necessary for the one to grant, or the other to have. The deed is silent as to the quantity of estate which it was intended to convey. There are no words of limitation, and by the rule of the common law, in reference to a grant of land, only an estate for the life of the grantee would pass. Here the rule of construction comes in again. As the professed purpose is to convey water to a mill, of course it was the intention that the supply of water should be kept up as long as the party wished to operate the mill. Few would be at the expense of erecting a mill, if the supply of water depended upon the uncertainty of life. We think there was a *base* or *qualified* fee granted in this easement, and that Gash, his heirs and assigns are entitled to it, so long as they continue to operate the mill. *Whitehead* v. *Garris*, 3 Jones' Rep. 171.

The parties carried this deed into effect themselves, and identified the subject of the grant by locating the race, fixing its limits, its width, and depth, locating the dam, fixing its

height, and the distance the water was to be ponded back; they and all claiming under them on both sides, are bound by these acts done in pursuance of the deed, not "as long as water runs or trees grow," (which was the language used by the grantor, according to one of the witnesses,) but as long as Gash, and those claiming under him, may wish the *mill to run.*

In strict fulfilment of his duty, under this deed, and to give it full effect, Jenkins inserts in his deed to the defendant Russell, "with the exception of a certain mill-race already cut on it." Afterwards the plaintiff came in under Gash, and the defendant Russell, under Jenkins, and this state of things continued until the year 1852. Russell bought *cum onere.* His deed sets out an express exception; and the question is, upon what ground can he get rid of it, and meet the equity of the plaintiff?

He alleges, that finding the effect of the dam at the head of the race was to pond back the water so as to render sobby and greatly injure much valuable land of his, and, "being under the conviction that the plaintiff was liable to him for damages, he threatened, and contemplated a suit for the same," &c.; but from reluctance to commence litigation, he proposed to the plaintiff, that he would allow him to cut a new race, beginning higher up the creek, to be used in place of the old one, so that the dam might be taken away, and the old race filled up; and that he would pay half the expense of cutting the new race; that plaintiff agreed to this proposition; the new race was accordingly cut, and the plaintiff agreed to accept it in place of the old one.

This ground is not tenable, for two reasons. The plaintiff's right is "an interest in land," an incorporeal hereditament "which lyeth in grant;" it could not, therefore, be conveyed except by *deed;* and an *agreement* to *convey* it, is void under the statute of frauds. But, in the second place, it is not supported by the proofs. The facts are, that when the defendant Russell threatened to sue for damages, he and the plaintiff came to an understanding, that a race should be cut, taking

the water out of the creek at a point higher up; each to pay one half the expense; and if, upon trial, it was found to answer the purpose as well as the old race, the plaintiff was to relinquish his right to the old race. It was accordingly cut, but did not answer the purpose, as it left the creek nearly at a right angle, and the water could not be made to flow into it without a dam, which would pond the water back upon the land of a third person; and besides, owing to the locality, it would fill with sand after every rain; so the plaintiff refused to accept it in place of the old race; but, nevertheless, the defendant Russell tore away the dam at the head of the old race, and filled it up and ploughed over it, in defiance of the remonstrances of the plaintiff.

In the mildest terms in which we can characterise it, this act of the defendant Russell, was a high-handed invasion of the rights of the plaintiff, and he has an equity to be put in *statu quo*, at the expense of the defendant Russell.

It was suggested that, in the view of the case taken by the Court, the contract being an executed one, and the title of the plaintiff complete, he has a remedy at law. The remedy at law is clearly inadequate, and the case falls under a well-settled head of equity jurisdiction, i. e., "confusion of boundaries." It is thus defined by Adams, page 238: "where boundaries have been confused by the misconduct of the defendant, or of those under whom he claims, the Court will issue a commission to ascertain the boundaries; it will, at the same time, if necessary, decree an account of rents and profits."

There will be a decree declaring the right of the plaintiff, and directing a commissioner to go upon the land and mark off a race in the site of the old one, fixing the same width and depth, and the location for a dam in the site of the old one, fixing a corresponding height; and he will report what it will cost the plaintiff to put the race and dam in the same plight and condition that it was in when formerly used; he will also report the 'profits that the plaintiff has lost by having the operation of the mill suspended.

The decree will enjoin the defendant Russell from hindering or interfering with the plaintiff in his ingress and regress, as often, and at all times that may be necessary, in order to open or repair the old race, and build a dam on the site of the old one; and there must be a perpetual injunction against the defendant Russell, and all claiming under him, from interfering, in any way, with the full exercise and enjoyment of the easement by the plaintiff and those claiming under him.

The bill will be dismissed as to the other defendants. They were not necessary parties.

The cause will be retained for further directions upon the report of the commissioner.

PER CURIAM. Decree accordingly.

NATHAN B. THOMPSON *against* JAMES PARKER.

The Act of 1812, Rev. Stat. ch. 45, sec. 5, is to be construed strictly, and its general words must be restrained so as not to extend its operation to cases which do not come within its meaning, or the mischief intended to be remedied.

An equity of redemption, therefore, cannot, under that Act, be sold by execution, unless it be absolute, undisputed, and grow out of a perfect mortgage.

Where there is a provision in a mortgage-deed, that the mortgagee may have the land discharged of the right of redemption at his election on paying a further stipulated sum, the right of redemption is not the subject of an execution sale.

Where the subject of the mortgage is itself an equity, the equity of redemption cannot be sold under that Act.

It is settled upon authority, that the mortgaged premises cannot be sold by execution to satisfy the mortgage debt; and whether they can be thus sold at the instance of the mortgagee for any other debt not secured in the mortgage-deed, *quære?*

CAUSE removed from the Court of Equity of Macon County.

The plaintiff made the following mortgage-deed to the de-

fendant, which was duly registered, and upon the construction of which this case principally turns, viz:

"Know all men by these presents, that I, N. B. Thompson, of the county of Macon, and State of North Carolina, do mortgage and pledge four tracts of land unto James Parker, of Cass county, Georgia, the said lands lying and being in the county of Macon, and State of North Carolina, and 8th District; one, which is known by No. 17; one other by No. 109; one other by No. 110; and the other No. 113; in the whole, containing 244 acres; all which, I mortgage and pledge unto said Parker, and deliver up the certificates for said land, to hold as surety for the valuable consideration of fifty dollars to me paid in hand And said Thompson do further agree, that said Parker may have said land by paying one hundred and twenty-five dollars more, otherwise the said Thompson may redeem said mortgage and certificates, by paying the fifty dollars, and its interest, by fall next; as witness my hand and seal, this seventeenth of May, A. D. 1841."

The remaining facts of the case are sufficiently set out in the opinion of the Court.

J. W. Woodfin, or plaintiff.
Baxter, for defendant.

Pearson, J. The bill sets out a deed executed by the plaintiff to the defendant in 1841. It recites that the plaintiff has received from the defendant, the sum of $50, in consideration whereof, he conveys to the defendant, "as a mortgage or pledge, to hold as security for the money," four tracts of land in Macon county, for which he held certificates of purchase from the State; the certificates are delivered to the defendant, but no words of limitation are used. The deed further sets out, that the defendant "is to have said land by paying ing $125 more; otherwise the plaintiff may redeem by paying the $50, with interest, by next fall."

The object of the bill is to set up the plaintiff's equity under this deed, and to this end, to have an account, &c.

The defendant, in his first answer, does not set up any ground upon which to defeat the plaintiff's equity as a bar, or legal defense; but he alleges many facts upon which he disputes the plaintiff's right to recover any thing; in regard to all of which facts, replication is taken, and the parties are at issue. The defendant afterwards files a supplemental answer, in which he alleges that, since filing his first answer, the plaintiff's equity of redemption had been exposed to sale by the sheriff, under execution for certain costs incurred in an action at law by the plaintiff against the defendant, concerning these lands, in which the plaintiff failed, and the defendant had judgment; at which sale the defendant became the purchaser of the plaintiff's equity of redemption, which was duly conveyed to him by the sheriff's deed, and this is set up as a bar to the plaintiff's equity.

The only question now before us is, had the plaintiff such an equity of redemption as was liable to be sold under the provisions of the Act of 1812?

In *Camp* v. *Cox*, 1 Dev. and Bat. 52, the proper construction of the Act of 1812 is very fully discussed. The Court, upon reasoning which is conclusive, holds that the Act is to be construed strictly, and that its general words must be restrained, so as not to extend its operation to cases which do not come within its meaning, or the mischief intended to be remedied; and it is decided that a sale of the equity redemption, under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by the Act. Whether the mortgagee may sell under execution for any other debt, not secured by the mortgage, is doubted; and many considerations are suggested why such a case does not come within the meaning of the Act. We think these considerations have much force, but will not put our decision upon that question, as there are other grounds on which we think the plaintiff is clearly entitled to a decree, and that the purchase by the defendant can have no other effect than to give a security for the amount of the judgment under which he purchased.

From the principles established by *Camp* v. *Cox*, and general reasoning, we are clearly of opinion that an equity of redemption cannot be sold under the Act of 1812, unless it is *absolute*, undisputed, and grows out of a perfect mortgage. In our case, the plaintiff's interest was not an equity of redemption of the kind above described in either of these particulars.

1. It was not absolute. Whether he had a right to redeem or not, depended upon a condition precedent; for the defendant was entitled to have the entire estate absolutely, if he elected to pay the sum of $125, in addition to the $50.

2. It was not undisputed. It abundantly appears from the testimony as well as from the defendant's first answer, that he disputed the plaintiff's rights; and the parties were at issue about almost every thing; when the plaintiff offered to redeem, the defendant refused, because he had taken possession; and when required to pay the $125, he refused, because he had already paid enough; in fact, the parties differed so entirely that they could not even agree to the terms of a submission to arbitration, by which, at one time, it was proposed to attempt a settlement of the several matters in controversy.

3. It was not a perfect mortgage, that is, one where the legal title passes to the mortgagee, but an imperfect one, under the class which Adams, at page 123, terms the "mortgage of an equity;" as where the mortgagor mortgages his equity of redemption. In our case the legal title was in the State, and the plaintiff held a certificate which entitled him to a grant, upon the payment of the balance of the purchase-money. Suppose a mortgagor mortgages his equity of redemption; he then has a second equity of redemption; surely it was not the meaning of the statute to subject this second equity to execution sale; for the matter has become doubly complicated, and it would be more so, upon a third or fourth mortgage. In like manner, the defendant, having paid a part, or the whole of the balance of the purchase-money to the State, caused this matter to be more complicated; and upon the whole, it is clear, that if, under all these circumstances, the defendant could have the plaintiff's equity of redemption exposed to

sale by the sheriff, he could buy it at his own price; for no third person, of sane mind, would have the hardihood to make "a bid in the dark." Such a construction of the statute would amount to a mockery of justice.

The plaintiff is entitled to a decree putting the defendant to his election, either to pay the $125, and interest, in which event the plaintiff will execute a proper deed to transfer the entire interest in fee simple; or to allow the plaintiff to redeem; in which event there will be a reference for an account.

PER CURIAM. Decree accordingly.

SARAH WILKINS AND ANOTHER *against* THOMAS F. HOGUE AND ANOTHER, ADM'RS.

Where the buyer of a tract of land has a full and complete remedy on a covenant of quiet enjoyment contained in the deed he has received, he cannot sustain a bill in a Court of Equity to enjoin the collection of the purchase-money, for a deficiency in the title to the land.

APPEAL from an interlocutory order of the Court of Equity of Cleaveland County, Judge BAILEY presiding.

The plaintiff Sarah purchased a tract of land from the defendants' intestate, David Hamrick, which is described by metes and bounds, particularly set out; and the quantity is stated in said deed at one hundred and fifty acres; the price of which was five hundred and twenty-five dollars; of which sum one hundred and twenty-five dollars was paid at the conclusion of the bargain; and, for the remainder of the purchase-money, $400, she executed her bond, with C. P. Wilkins as her surety, payable one day after date; of which she paid the further sum of $240. The deed executed by defendants' intestate contained the usual covenant of quiet enjoyment.

The plaintiffs, in their bill, allege that the boundaries, as set forth, include only one hundred and forty acres, and of

this quantity, thirty-six acres are covered by an older and better title, under a grant issued to Logan Weir, and now owned by one George Martin; that the said thirty-six acres are of excellent quality, and formed her chief inducement to make the trade, the rest of the land being considerably worn, and much of it old fields. She alleges, that at the time she took the deed from the defendants' intestate, and at the time she paid the several sums mentioned, she was entirely ignorant of this deficiency in the quantity; and that having discovered it, she has refused to take possession of the land, and offered to reconvey to the defendants. The bill further alleges that suit has been brought, for the remainder of the bond, against her and her surety, in the Superior Court of Cleaveland, and that the defendants threaten to enforce, by execution, the collection of the amount due, when they shall have recovered their judgment.

The prayer of the bill is for an injunction to restrain the defendants from taking out execution upon their judgment at law, and that they shall discharge the same, and account to the plaintiff Sarah, for the value of the thirty-six acres; also for general relief.

The defendants, who are the administrators of David Hamrick, say, that the estate of their intestate is amply good for any amount which might be assessed against them as damages for a breach of the covenant of quiet enjoyment, which is contained in the plaintiffs' deed; and having a full and perfect remedy at law, they submit whether they should be put to answer this complaint in a Court of Equity. Having no personal knowledge of the facts set out in the plaintiffs' bill, they neither admit nor deny them; but if the same should become necessary, they insist on holding the plaintiffs to proof of their allegations.

An injunction having been issued, according to the prayer of the bill, on the coming in of the answer a motion was made to dissolve it, and on argument, before Bailey, Judge, the motion was refused, and the injunction was continued; from which order the defendant appealed.

Guion, for plaintiffs.
Hoke, for defendants.

Battle, J. The order from which the appeal was taken is, in our opinion, erroneous. The injunction was granted improvidently, and ought, therefore, to have been dissolved upon the motion of the defendants. The plaintiffs took a deed for the land in question, which described it by metes and bounds, and she relied upon the covenant of warranty for the security of the title. She alleges, indeed, that there is a defect in the title to a part of the land, but does not pretend to state that the covenant for quiet enjoyment has been broken by her eviction from it by a person claiming under a paramount title. She has also failed to state that the defendants are not able to make good any damage which she may sustain in the event of her eviction.

From all that appears, then, she has a complete and full remedy at law for any and every wrong which which she is likely to sustain by reason of the breach of the covenant contained in the deed of the defendants' intestate; and she had, therefore, no cause for coming into this Court for relief. See *Merrit* v. *Hunt*, 4 Ire. Eq. 406.

The order to continue the injunction must be dissolved, and this opinion must be duly certified to the Court below as the law directs.

Per Curiam. Decree below reversed.

JOHN SPARKES AND OTHERS *against* SHEMUEL KEARNEY AND OTHERS.

It is no part of the duty of a trustee, appointed to sell for the payment of debts, to put slaves, conveyed in the trust deed, out as apprentices to trades, and he is liable to account for the value of the services of such slaves, during such apprenticeship.

An administrator, or trustee appointed to sell, who keeps back certain slaves to await the event of a suit pending against him, (involving their title,) is not bound to account to the next of kin for their hires, before the decision of the suit.

CAUSE removed from the Court of Equity of Cleaveland County.

Stephen Sparkes, of the County of Franklin, in this State, made a deed in trust, dated 10th day of April, 1843, to indemnify the defendants Shemuel Kearney and Richard W. Kearney, as sureties for certain debts therein mentioned, and to secure the payment of these debts to the several creditors; in which said deed were conveyed to them, (the said Kearneys,) a tract of land, containing 957 acres, which said Sparkes had bought from Jones Cooke, as the executor of William Harrison, S. J. Jones, and Jones Cooke; also an improved lot of land in the town of Franklinton; also twelve slaves, by name, and their increase after the date of the deed; all his house-hold and kitchen furniture; all his cattle, horses, mules, oxen, sheep, hogs and pigs; also, a wagon; and appointed the said Kearneys agents to collect large sums of money due him from divers persons, to be held on the same trusts. The condition of the trust-deed was to sell the property, and apply the proceeds to the payment of debts specified; to pay the trustees a reasonable sum for their agency and services in selling the said property, &c.; and the residue, if any, to pay over to Stephen Sparkes, or his assigns, and reconvey the property not sold for the purposes of the conveyance in trust. Stephen Sparkes, besides the slaves conveyed, had two other female slaves, Candice and Minerva, which were in his possession at his death, but these are claimed by one White, and a suit is still pending as to them; these went into the hands of his administrator. Sparkes died, in the autumn of 1846, intestate, and all his personal property remained in the possession of his wife up to her death, which occurred in the year 1848. The defendant, Hilliard, administered on his estate on 12th January, 1849. The title of the 957 acres of land proving defective, he was evicted by title paramount. The suit in eject-

ment was begun in the life-time of the said Stephen, but was decided after his death. A recovery was, however, subsequently had on the covenants in the deed from Jones Cooke, &c., to Stephen Sparkes, and the money collected and paid over to the trustees.

This bill was brought by the next of kin and heirs-at-law of Stephen Sparkes, charging collusion between the trustees and the administrator, and praying an account and settlement of the estate, as well that in the hands of the trustees, as that in the hands of the administrator.

At the August term, 1855, of this Court, it was declared as the opinion of the Court, "that the said Hilliard, as administor, and the said defendants, Shemuel Kearney and Richard W. Kearney, as trustees, are liable, and ought to account to and with the plaintiffs and others, the next of kin, and heirs-at-law of the said Stephen Sparkes, deceased;" and it was decreed, among other things, that "the clerk do take an account of the personal estate of the said Stephen, deceased, which came to the hands of the said Wm. F. Hilliard, as administrator, or to the hands of any other person, by his order, or to his use. And that he also take an account of the trust estate of the said Stephen Sparkes, in the hands of the defendants, Shemuel Kearney and Richard W. Kearney, as trustees, as well of the realty as the personalty—computing what is due on the said trust, for principal and interest, and to whom; and computing what portion thereof is properly due to the next of kin and heirs-at-law of the said intestate. And it is ordered that the said intestate's personal property be applied in the payment of his debts, and funeral expenses, in due course of administration," &c.

In obedience to this order, the clerk of this Court at Morganton, *Mr. Dodge*, made a report in extenso upon the several matters referred to him; but only that part which embraces the matter excepted to, it is deemed expedient to notice.

While the slaves were in the possession of Mrs Sparkes, (immediately ensuing the death of her husband,) a medical bill, taxes and other expenses, were paid by the trustees, and charg-

ed against the estate. The *first exception* to the report is for the clerk's refusal to allow this charge.

While the property was in the possession of the trustees, after the death of Stephen Sparkes, three of the slaves, Hardy, Henderson and Stephen, were, by the trustees, put to trades, and kept working at the same for two years. Mr. Dodge thought it was wrong to put these slaves to such service, and that they ought to pay hires for them during such apprenticeship; accordingly, they were so charged in his report, and this forms the ground of the *second exception*. The argument in support of this exception was, that the estate received the increased value of the slaves in the amount produced by their sales.

The *third exception* is, that the clerk has charged the trustees with the rent of the house in Franklinton in favor of the next of kin; whereas, as the defendants insist, rent is to be accounted for to the heirs, when they apply to redeem the land; and that the sum received for damages for the breach of the covenant of seizin and quiet enjoyment is, likewise, allowed in favor of the next of kin, whereas it should be allowed in favor of the heirs-at-law.

The nature of the *fourth exception* is sufficiently explained in the opinion of the Court.

The *fifth exception* is, that the hires of the girls, Candice and Minerva, are charged against the administrator, although there is a suit pending against him for the recovery of the slaves themselves.

The *sixth exception* is, that the clerk has not reported what is due to the heirs, and what to the next of kin.

The *seventh exception* is sufficiently noticed in the opinion of the Court.

The cause was heard upon a motion for further directions and upon exceptions to the report of the clerk.

Guion, for the plaintiff.

Winston, Sr., and *Avery*, for defendants.

BATTLE, J. By an interlocutory decree made in this cause at August Term, 1854, it was referred to the clerk to make certain enquiries, and state certain accounts; which duty he has performed; and it comes on now upon a motion for further directions upon his report and exceptions filed thereto by the defendants Hilliard and Shemuel Kearney.

1. The first exception is, that the clerk has refused to allow, as credits to Kearney the trustee, the payments made by him for medical services rendered to the slaves, while they were in the possession of Mrs. Sparkes, and for the payment of the taxes and other expenses of the said slaves during that time. This exception is overruled. He is not charged for the hires or profits of the slaves during that period; and if he permitted the widow of his grantor in trust to keep them, he ought to have made her pay their expenses while she was using them for her own benefit.

2. The second exception, that the clerk has charged Kearney with the hires of three of the slaves, to wit, Hardy, Henderson and Stephen, while they were learning their trade, and also with their full value, upon the sale of them made afterwards, is also overruled. As trustee to sell the property for the payment of debts, it was no part of his duty to have the slaves instructed in trades. There is no testimony to show that either of the said slaves, except Hardy, was increased in value by these means; and if the value of Hardy were increased, the benefit must accrue to the *cestui que trusts*, and not to the trustee.

3. The third exception is sustained. The personal property was the primary fund for the payment of the debts, unless the trustee, in the exercise of the discretion entrusted to him, thought proper to sell the lands for the payment of the debts mentioned in the deed in trust. Not having done so, the land, and the rent as an incident to it, belong to the heirs-at-law, instead of the next of kin, and in this case they are not the same persons. For a similar reason, the damages recovered for a breach of the covenant of warranty which occurred after the death of the grantor in trust, must belong to the

heirs. If there had been no trust, the land of the ancestor would have descended to his heirs, and, of course, they would have sued on the warranty, and taken the damages. So, the recovery by the trustee must be for their use after the purposes of the trust have been otherwise satisfied.

6. The sixth exception will be considered here, as it depends on the third which we have just decided; and that decision makes it necessary that it should be sustained. As the next of kin, and the heirs-at-law of Stephen Sparkes, are not the same persons, there must, of course, be a report to show what is due to the one class of persons, and what to the other.

4. The fourth exception is overruled; because the testimony does not show that the defendants are entitled to anything for the support and the burial expenses of the slave Isaac. One of the witnesses, Mr. Person, states that while Isaac lived with Mrs Sparkes, he was worth $25 or $30 per annum; but he knows nothing of him afterwards. Mr. Perry says that he was not worth anything; but no witness states that he was an expense.

5. The fifth exception is sustained; and for the reason which is assigned in it. The girl slaves, Candice and Minerva, have been claimed by another person, and a suit has been instituted, and is now pending for them. If recovered, their hires may possibly be claimed and recovered also by the same person. It was wrong, therefore, to charge the hires at present against the administrator, in favor of the next of kin.

7. The seventh exception is overruled. It is not founded on the ground that the clerk fixed the charge for keeping the slaves Piety and her children, and Betty and her children, at the sums which he reports, without evidence. It is that he fixed it too low. There is no testimony before us to show that it ought to be higher, and we cannot correct the clerk's estimate, without some means of ascertaining what the true charge ought to be.

It must be referred to the clerk to correct his report in the

particulars mentioned, and the cause is retained for further directions.

PER CURIAM. Decree accordingly.

DANIEL F. RAMSOUR *against* EMANUEL SHULER.

Where a vendee, receiving a defective title from his vendor, afterwards completes it, all that he can claim off of his vendor in a Court of Equity is the amount expended in completing his title.

CAUSE removed from the Court of Equity of Cherokee County. This cause was before the Court at August Term, 1852, on a demurrer to the bill, (Reported 8 Ire. Eq. 304, as *Ransom* v. *Shuler*.)

The plaintiff purchased of the defendant two tracts of land, situate in the County of Cherokee; one tract, known as No. 155, and the other, as 153; the first, described by metes and bounds, and expressed to be for ninety-four acres; the other, described in like manner, as containing one hundred and seventy-one acres; and took from the defendant a conveyance of his interest in the said two tracts, which was that of a purchaser at the commissioner's sale in 1838; and also took from him an authority to the Secretary of State, to issue the grant whenever he, the plaintiff, should discharge the bonds which defendant had given the State for these lands. After this trade, the defendant removed to Georgia, where he still resides.

The plaintiff alleges, in his bill, that the defendant had been in possession of the premises for many years before he sold to the plaintiff, and that he had made valuable improvements —such as a good dwelling-house, out-houses, grist-mill and orchard, and had improved much of the land by clearing; that when the plaintiff was viewing the lands with the intention of purchasing, the defendant pointed out these improvements and

clearings as situated on the 171 acre tract; but to his astonishment, afterwards, on surveying the lands, he found that no part of these improvements was on the tract designated in the deed, but that they were on unappropriated lands belonging to the State; that the price he was to give for the said tracts of land was $600; that he paid down $300, and gave his bond for $300, of which he has paid all but $182; that the said improvements were worth some two or three hundred dollars; that the defendant well knew the fact that the boundaries of the two tracts did not include the improvements, but fraudulently misrepresented the matter as above stated; that suit was brought on the bond given by plaintiff to the defendant, and a judgment taken for the remainder of the purchase-money, and that execution was about to be taken out upon it.

The prayer of the bill is for an injunction, and for general relief.

The answer of the defendant admits the contract and conveyance as set forth, and that he described and pointed out the improvements, &c., as being on the lands designated; he says, also, that "it *may be* that the lines of his tract do not include all his improved lands, or all which he supposed he was selling, or that the plaintiff thought he was purchasing;" but he avers that, by his purchase, the plaintiff acquired rights under the laws, in virtue of these improvements and occupancy, which enabled him, for a trifling sum, not exceeding twenty dollars, to perfect a grant for the land, including the improvements; and he avers further that the plaintiff has already done this. He says that he was entirely ignorant of the fact that the improvements were outside of his lines.

There was replication to the answer. Subsequently, it was referred to the clerk and master of the Court of Equity of Cherokee, to enquire and report "how much land, if any, represented by the defendant to be included within the boundaries of his title, is not so included; and its relative value; and what rights, if any, plaintiff acquired by his said purchase; and if he has secured any legal or other claim thereto, upon

what rights he did so." Upon this reference, *Mr. Axley*, the commissioner, reports, among other matters:

That the dwelling-houses, out-houses, orchard, garden, and twenty-five acres of cleared land are not included in the boundaries designated in the deed from the defendant to plaintiff, but were on vacant land, and that this part had been represented by defendant to be included in his boundaries; that, by this purchase plaintiff acquired no right to this omitted part, except the right of possession; that the plaintiff availed himself of this pre-emption right, and entered one hundred acres, including the buildings, which cost him $22,41; that the value of these improvements was $250. He further reports that the cleared land, outside of the lines designated, had been entered by one B. Allison, which was procured from him by plaintiff, and that he subsequently obtained a grant for this part also, which cost him $22,41 more; in all $44,82; and that the value of this improvement was $50.

The cause was set down for hearing on the bill, answer, exhibits and former orders; also, upon the report of the commissioner, and upon a motion to dissolve the injunction heretofore issued, and sent to this Court by consent.

Gaither, for plaintiff.
Baxter, for defendant.

Nash, C. J. The plaintiff purchased from the defendant two tracts of land in Cherokee County, situated in the fifth district; one known as number 153, the other as number 155; one containing 94 acres, the other 171, for the price of $600, of which he paid $300, and gave his bond for the balance, payable one day after date. The defendant had been in possession many years previous to the year 1838, and had made valuable improvements on them, consisting of houses and an orchard, and cleared much of the land; all of which were shown to the plaintiff by the defendant, as being on the land owned by the defendant. The plaintiff took possession, and having the 171 acre tract surveyed, which was No. 153, found

that the most valuable improvements, such as the dwelling-house, barn and cleared ground, were on vacant land, all of which were shown to him by the defendant as being on No. 153, and he purchased under that belief. The purchase-money has been paid up, except $180, for which the defendant has brought an action against the plaintiff; the defendant being a citizen of Georgia, and owning no property in this State, the plaintiff has no remedy at law, and he prays an injunction to restrain the defendant from enforcing his judgment for the sum unpaid. The defendant alleges that, at the time of the sale of the plaintiff, he fully believed that all the improvements mentioned, were on lot No. 153, and that the plaintiff, at a small expense, might get the title to No. 155. The case was referred to commissioner Axley, to enquire and report how much land, if any, represented by defendant in negotiating his contract of sale to the plaintiff, to be included within the boundaries of his title, that is not so included, and its relative value; *and what rights, if any, plaintiff acquired by his purchase; and if he has secured any legal, or other claim thereto, upon what right he did so, and at what cost.* The commissioner reported that, under his purchase, he acquired no right to the land and improvements outside lot 153, but the possession. But under the provisions of the act of 1851, concerning the purchase of Cherokee lands, he acquired a pre-emption right to one hundred acres of land, by being in the possession; and having the right of possession by virtue of his contract aforesaid, the plaintiff availed himself of his pre-emption right, entered one hundred acres, including the buildings, &c., which cost him $22,41. The commissioner further reported, that the cleared land, not included in the lot 153, was entered by one Allison, under the act of 1850, and by him assigned to the plaintiff, who has perfected his title by grant, at a cost of $22,41. This report has not been objected to by either party. The plaintiff, then, has a complete title to all the land embraced in his contract with the defendant. He now has all he contracted for. Availing himself of the improvements made by the defendant, he has completed his

title by paying the necessary expenses. A Court of Equity will not compel a purchaser to take a title substantially defective; but it is the privilege of the vendor to complete it. But if the purchaser does it, he gets all he bargained for, and can ask from the vendor nothing more that the expenses incurred in completing it. *Nance* v. *Elliot*, 3 Ire. Eq. Rep. 408, and *Westall* v. *Austin*, 5 Ire. Eq. Rep. 1.

The necessary expenses incurred by the plaintiff in completing his title to the land on which the improvements were made, amount to $44,82. For this amount he is entitled to a credit on the judgment obtained by the defendant.

The injunction is dissolved as to all but the sum of $44,82. The defendant must pay the costs.

PER CURIAM. Decree accordingly.

HUGH S. McKNIGHT *against* PATRICK J. WILSON.

Where a trustee is appointed for the purpose of protecting the trust property from the debts and extravagant expenditure of the *cestui que trust*, who is to have the use of it for his life, with a limitation over, and such trustee encourages extravagance and waste by lending the *cestui que trust* money, becoming his surety, and otherwise becoming his creditor, the Court will not lend him its aid to subject the trust property to the payment of such debts; especially where the trustee has already authority to sell for reasonable and proper expenditures.

CAUSE removed from the Court of Equity of Mecklenburg County.

The bill of the plaintiff alleges, that one Samuel Wilson died in the year 1843, having made and published his last will and testament, which was duly proved; that amongst other provisions in the said will, are the following:

"6th. I give and bequeath unto Sidney X. Johnston and his heirs, the following property (mentioning particularly, lands, slaves, and other valuable property,) in trust for the use of

my son Patrick J. Wilson, during his life, and at his death, to the use and benefit of the lawful issue of the said P. J. Wilson; and should he die without lawful issue, then, and in that case, I will and bequeath said property to my surviving children and their issue, share and share alike. It is my will that all the property devised and bequeathed to the said Sidney X. Johnston be held by him for the trusts aforesaid; that in no event it be subject to the payment of my son's debts. The said Sidney X. Johnston is hereby authorised to permit the said P. J. Wilson to have the use of the said property and effects, in such way as he shall judge most expedient to effect my intentions towards him; and the said Sidney X. Johnston is also allowed to sell all, or any part, of the said property that he thinks proper, and hold the proceeds of the said sale upon the same trusts;" that Sidney X. Johnston renounced the trust mentioned in the said will, and that the plaintiff, by a decree of the Court of Equity, was substituted in his place, and that he undertook the execution of the same.

The bill asserts that the equitable interest of P. J. Wilson is not liable for the payment of his debts.

It is further alleged in the bill, that P. J. Wilson is a man of profligate habits—intemperate and extravagant; that he has held possession of all the property willed to S. X. Johnston for his use, since the death of his father; that he has squandered the proceeds, and in addition thereto, contracted numerous debts, upon a number of which, suits at law have been brought, judgments obtained, and executions issued against him; that plaintiff, being a brother-in-law of the defendant, as well as his trustee, and being desirous of saving the property bequeathed and devised, and to prevent the defendant from being harrassed by his creditors, has deeply involved himself by *going security* for him, and has also paid out large sums of money for him, and that he is otherwise indebted to the plaintiff.

The prayer of the bill is, that the Court will decree the sale of the property conveyed in trust by said will, for the satis-

faction of plaintiff's claims, and the debts where he has made himself liable for the defendant; and for general relief.

To this bill there was a general demurrer and joinder in demurrer; and the cause being set down for argument, upon the bill and demurrer, was sent to this Court.

No counsel appeared for the plaintiff in this Court.
Boyden, for defendant.

Battle, J. The demurrer to the bill raises at once the question whether the plaintiff has therein stated a case which entitles him to the aid of this Court. The plaintiff, by allowing himself to be substituted in the place of Sidney X. Johnston, the trustee named in the will, has assumed all the duties, and become liable to all the responsibilities, which the testator had attached to the trust created by his will. It is manifest that the testator regarded his son, the defendant, as an unfit depositary of the property which he intended to give for his benefit, and it is clear that he intended that the trustee whom he selected should exercise a restraining influence over the expenditures of his son. Among the many important powers conferred, and duties imposed, upon Courts of Equity, those in relation to trusts hold a prominent place. In every thing relating to the trustee, and his *cestui que trust*, these Courts are to see that the object of the trust shall be fully accomplished; and it is their especial duty to supervise the acts of the trustee, and to prevent him from taking advantage, in any manner, of the person who, or whose property, is confided to his care or management. If the trustee be about to commit a breach of trust, the Courts will restrain him, and it follows necessarily that they will never sanction, or order, such a breach. In the present case, it was the duty of the plaintiff to protect the trust property, so far as he could, against the extravagant expenditures of the defendant, and not himself to encourage such extravagance, by lending him money, paying his debts, or becoming in any other way his creditor. For the reasonable and proper expenses of the defendant, the

plaintiff, having the legal title of the property, with an express power to sell it, may do so without calling upon this Court; and for any other expenses, the Court cannot aid him in doing that which it is his duty not to do. In either case the bill is unnecessary and improper, and cannot be sustained.

What the rights of other creditors of the defendant may be, it is unnecessary for us now to say. The cases of *Dick* v. *Pitchford*, 1 Dev. and Bat. Eq. Rep. 480, and *State Bank* v. *Forney*, 2 Ire. Eq. Rep. 181, will be found to contain able expositions of the law in relation to the subject. Being unable to discover any equity in the case stated by the plaintiff, the demurrer must be sustained, and the bill dismissed with costs.

PER CURIAM. Bill dismissed.

JAMES W. PATTON AND JOHN E. PATTON, EX'RS., *against* THOS. T. PATTON AND OTHERS.

Where all the personal property of a father had been placed by him in the hands of one of his sons to manage the same and dispose of a part of it in legacies, as he should afterwards direct in his will, (the overplus to belong to this agent, who was afterwards appointed executor,) and certain property is sold by the agent to another son, who had been put in possession of it with an intention of its being his; and such property is afterwards bequeathed to the son thus possessed of it, without any knowledge on the part of the testator, that it had been sold; it was *held*, that this legacy was not adeemed by the previous sale to the legatee, but that it should be made good to him out of the testator's estate.

CAUSE removed from the Court of Equity of Buncombe County.

This bill was filed by the plaintiffs, as executors of the late James Patton, praying the Court that an account might be taken, under the instructions of the Court, and the whole estate settled finally, so that they might be discharged of the trust imposed by their testator's will.

Among the other clauses in the will of James Patton, is one (item 13) which is as follows:

"Believing that it would promote the interest of all my family, I concluded, upon the 24th of September, 1827, to commit to my son James the entire management of the estate. I estimated my personal property to be of the value of forty-five thousand dollars, and determined that he should pay out of it such legacies as I might bequeath to his brothers and sisters; and that so much of the original fund, together with the accumulation made by his care and management, as might not be exhausted by the payment of legacies, should ultimately be given to him. From that period to this, he has conducted my business to my entire satisfaction—has paid to his brothers, John and Benjamin, in discharge of their legacies, and in partial payments to his sisters, the aggregate sum of thirty-six thousand seven hundred and forty-four dollars, ($36,744.) In compliance with my original intention, and to enable him to pay the several legacies herein mentioned, and to perform faithfully the many important trusts which will devolve upon him, I give him all my personal estate not herein before specifically bequeathed, with the exception of the house-hold and kitchen furniture, stock, crop and farming utensils at my farm on Swannanoah, which I give to my son Thomas."

In the next clause of his will, (item 14,) the testator bequeaths, among other things, as follows: "Of the legacy to my daughter Anne, (Mrs. Anne E. Smith,) I direct that two thousand dollars shall be paid by my four sons, (James W., John E., Thomas T. and Benjamin,) in equal proportions—$500 each—out of the legacies to them given."

By virtue of the power and authority given to his son James W. Patton, on the 27th of September, 1827, he sold to Thomas T. Patton all the crop, stock and farming utensils at the Swannanoah farm, for $2,244,50, received payment for the same, and appropriated the amount received to his own use. When Mr. Patton made his will, he was ignorant of any such transfer having been made. Thomas was in possession of the farm and had been for several years.

It was referred to the clerk and master in Equity of Buncombe County, to state an account of the effects, which had come into the hands of the executors, &c.

In the report filed, it appeared that the sum of ninety-one dollars and fifty cents was deducted from legacies given to three of the testator's grand-children, J. N. and J. P. Perkins, and Mrs. Cox; the reason given was, that that sum had been overpaid to their mother. This formed the ground of the first exception.

The clerk and master refused to charge the executors with the value of the crop, stock and farming utensils, in favor of Thomas T. Patton, upon the ground, that when the testator made his will, he did not own that property. This formed the ground of the second exception.

There was no other legacy in the will to Thomas T. Patton than that last above mentioned; and the clerk refused to allow any charge in favor of Mrs. Smith against Thomas T. Patton, as, according to the above report, he was to receive no legacy out of which it could be paid. To this she excepted.

The cause was heard upon a motion for further directions, upon the report of the clerk and master, and upon the exceptions above stated.

N. W. Woodfin and *Gaither*, for plaintiffs.
Baxter and *Avery*, for defendants.

Battle, J. This case comes on for further directions upon the report of the clerk and master of the Court of Equity, for the County of Buncombe, and the exceptions thereto.

The exceptions of the defendants J. P. Perkins, J. N. Perkins and Mrs. Cox, are sustained, for the reason that the amount overpaid to their mother, Mrs. Smith, cannot be deducted from what is due them.

The exception of the defendant Mrs. Anne E. Smith, depends upon that of the defendant Thomas T. Patton, which we will, therefore, consider first.

This exception depends upon the proper construction of the 13th item of the will of the plaintiffs' testator, referred to in the report. This clause of the will, which was made and published in 1835, is of a very uncommon and extraordinary character. It commences by reciting that the testator, believing that it would promote the interest of all his family, had, in 1827, committed to his son James W. Patton, the entire management of his estate; that he estimated the value of his personal property to be forty-five thousand dollars, and out of it he intended that his son James should pay such legacies as he might bequeath to his other children, leaving the residue for his said son. He then declared that his son had conducted the business to his entire satisfaction, and that he had paid to his brothers John and Benjamin, in discharge of their legacies, and in partial payment to his sisters, the aggregate sum of thirty-six thousand, seven hundred and forty-four dollars. The testator then proceeds thus: "In compliance with my original intention, and to enable him (James) to pay the several legacies herein mentioned, and to perform faithfully the many important trusts which will devolve upon him, I give to him all my personal estate, not herein before specifically bequeathed, with the exception of the house-hold and kitchen furniture, stock, crops and farming utensils, at my farm on Swannanoah, which I give to my son Thomas." By reference to the fourth item of the will, it will be seen that the testator gave his farm on Swannanoah, together with certain slaves, to his executors, in trust for the wife and children of his son Thomas. On the marriage of Thomas, which occurred some years before the will was made, the testator put him in possession of that farm, and he continued to reside on it with his family, taking and applying the profits of it for the use of himself and his family.

In the year 1832, it appears from the proof, that the plaintiff James W. Patton, sold to his brother Thomas, the crop, stock and farming utensils on the said farm, for the sum of $2,244,50, and received the price, and appropriated it to his own use. The question is, whether the defendant Thomas is

entitled, under the circumstances, to claim that sum, with interest, from his brother James; and we think that, upon the fair construction of the item in question, aided by lights reflected from some other parts of the will, he is so entitled. It appears from several clauses of the will, that the testator designated as legacies what he had previously given to his respective children; and further, that he intended that his son James should advance in his life-time what he then bequeathed to them by his will. Such, no doubt, was his intention with regard to the legacy to his son Thomas. It is very certain that he did not intend his son James should have the benefit of it, for it is expressly excepted out of a general gift to him of all his personal estate. His son Thomas was in the possession of it, and it does not appear that he knew that his son James had sold it to him, and had received the price to his own use, and we are not to presume that such was the fact, against the inference to be drawn from the words of the will itself. The testator, though an old, was apparently a very intelligent man, and we can hardly believe that he would mock his son by bequeathing to him what he had already, by his agent, sold to him; and sold to him too, for the benefit of another son, who, he declared at the same time, should not have that legacy. That he intended this as a bounty to his son Thomas, is apparent from another consideration. This is the only direct gift to his son Thomas, yet he charges him with the payment of five hundred dollars to Mrs. Smith, one of his sisters. This would be another instance of an illusory gift, if Thomas is to take nothing under the will. No person can read the will, without being entirely satisfied that the testator never contemplated any such result. But it is contended for the plaintiff James W., that the legacy was specific, and was advanced in the testator's life-time; and for this is cited 1 Roper on Leg., ch. 3, p. 237. The general doctrine is admitted; but we do not think it applies to this case. Here, the will operated as a confirmation of what the testator supposed was a gift to his son Thomas. The words of the will itself contradict the supposition of a sale of the goods with the

knowledge and consent of the testator. Our opinion, therefore, is, that the defendant Thomas is entitled to claim from the plaintiff James W., the price of the crop, stock and farming utensils in question, and with interest thereon from the death of the testator, and his exception is, therefore, sustained.

The exception of the defendant Mrs. Smith, being dependent upon that of the defendant Thomas, is also sustained. The report of the clerk and master, after being reformed in the particulars excepted to, will be confirmed, and a decree may be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

WILLIAM CANSLER *against* WILLIAM W. EATON AND JAMES F. LEACH.

In assignments of interests resting in grant, if there be no fraud, the purchaser must depend, to make good a deficiency of value, wholly upon his covenants.

CAUSE removed from the Court of Equity of Lincoln County.

On the 9th of August, 1848, the defendants executed to the plaintiff the following deed of assignment, viz:

"Know all men by these presents, that James F. Leach and William W. Eaton, who are legally possessed of the patent-right of J. W. Howlet and F. M. Walker's improved smut-machine, patented May 9th, 1846, as will appear by reference to the record of the Patent Office, do by these presents sell unto William Cansler, of Lincoln County, State of North Carolina, the full and exclusive right to twelve Counties, viz., Walker, Murray, Chatooga, Cass, Gilmer, Floyd, Paulding, Cobb, DeCalb, Campbell, Carroll and Dade, all in the State of Georgia, to sell in any way, either by County or individual rights, to sue and bring suits the same as Leach

and Eaton, in case of patent being intruded on; as witness our hands and seals, this 9th day of August, 1848;" and took eight bonds, of one hundred dollars each, from the plaintiff, payable six months after date, as a consideration for the said deed.

The plaintiff alleges in his bill, that shortly after the execution of the deed and bonds, he was making preparation to construct and vend machines according to the specifications of the patent above contracted for, in the twelve Counties above named; but that he found out, and he alleges the fact to be, that the same machine had been duly patented on the 12th day of November, 1835, by one Edmund J. Fitzpatrick, and that the right to sell the same in the State of Georgia, was vested in L. D. Childs by deed of assignment, bearing date 11th day of February, 1842, who threatened to sue the plaintiff if he presumed to use and exercise the right pretended to be assigned in the deed above set out; and that at the time of making this contract, the defendants well knew that the said machine had been previously patented by the said Fitzpatrick, and the right to make and vend machines was in the said Childs; and, that taking advantage of the youth and inexperience of the plaintiff, the defendants did, by imposition and false representations, induce him to make this contract.

The prayer of the bill is for an injunction to stay the collection of said bonds, and for general relief.

The answer denies all fraud and combination, and insists that the patent-right conveyed is for an original invention, and not an encroachment on any precedent right; but if it be otherwise they were totally ignorant of such preceding patent when they sold to the plaintiff, and were guilty of no fraud.

There was no proof taken on either side; and the cause being set down for hearing on the bill and answer, was sent to this Court by consent.

Avery and *Lander*, for plaintiff.

Boyden, for defendants.

NASH, C. J. The record in this case is carelessly drawn up. There is nothing upon it to show that the defendants even answered the bill. An order of publication was made as to the defendant living out of the State; but there is nothing to show that the bill was taken pro confesso against him. The answers of the two defendants living in the State are on file; but how they came there we are not informed. In the present condition of the record, we certainly should not decide the case, if we were not at liberty to presume that all the orders necessary to its final decision, had been made in the Court below; and if we were not satisfied that, from a decision in this Court, the plaintiff cannot sustain his bill.

In the case of *Hiatt* v. *Twomey*, 1 Dev. and Bat. Eq. Rep. 315, the bill charged that the defendants had sold and conveyed to the plaintiffs, the exclusive right of constructing, vending and using, in the Counties of Stokes and Orange, in this State, a patent-right, for a new and useful method of letting in water upon water-wheels. The bill charged fraud on the part of the defendants, and prayed for a rescission of the contract. The Court say, that in contracts for the assignment of such interests, if there be no fraud, the purchaser must depend, when they prove of no value, wholly upon his covenants. Both parties are equally innocent; there is no necessary warranty of title; and the loss must fall wherever the bargain leaves it.

In our case, the plaintiffs purchased of the defendants the patent-right, to use, construct and sell, within a specified region of country, the patent-right to a smut-machine, and allege that they subsequently discovered that a patent for the same machine, before the date of the patent under which the plaintiffs claimed by assignment, had been granted to another person, which renders their purchase of no value, and that the defendants knew of its existence at the time they sold to the plaintiff; and the bill prays the defendants may be enjoined from suing on the bonds given for the purchase-money of the patent, and that they may be decreed to surrender them up to be cancelled.

The answers expressly deny, if there were any precedent patent for the machine, the use of which they had conveyed to the plaintiffs, that they knew of it; and they deny that such patent was made. They deny all fraud; and aver that, at the time of the sale, they did believe, and do still believe, the patent-right they conveyed to the plaintiffs was good; and that they had a right to sell and convey it.

There is no evidence in the case; and there is no fraud, as far as we can perceive. If such a patent as is alleged by the plaintiffs, does exist, there is nothing to prove that the defendants had any knowledge of it. Both parties are equally innocent. This Court cannot interfere; but leaves the plaintiffs to their remedy at law, if they have any.

PER CURIAM. The bill is dismissed with costs.

JAMES W. JONES *against* HIRAM CARLAND AND OTHERS.
AND HIRAM CARLAND AND WIFE *against* JAMES W. JONES.*

Where B, one of eleven heirs at law, represented to A, another heir, who owned two elevenths, that he had purchased eight parts, which, with his own, amounted to nine parts; and they agreed in writing to divide the land between them, so as to give A his two elevenths adjoining his other land, and such agreement was carried into execution by marking a dividing line, each taking possession, which was held for nine years without question; upon a bill for specific performance, B shall not be heard to say that he was not able to perform, because he did not own all the shares he had claimed, but a performance will be decreed.

CAUSES removed from the Court of Equity of Henderson County.

Some time in the year 1831, Thomas Jones died intestate, leaving him surviving, eleven heirs at law, namely, Martha, the wife of Hiram Carland, Russel L. Jones, W. D. Jones, James Jones, Thomas Jones, Nancy Penland, wife of G. N. Penland, Nelly Luther, wife of Soloman Luther, Patty Reeves, wife of Larkin Reeves, Nelly McCraken, Rachel Peoples,

*These cases were argued and considered together at last term when the first opinion was filed.

wife of George N. Peoples, and Jane Lance. At the time of his death, he was seized in fee of a certain tract of land, lying on French Broad River, known as the Swan Pond tract, containing about 500 acres. The plaintiff purchased the shares, or interest, of Wm. D. Jones, and James Jones, in said land, amounting to two elevenths. Hiram Carland, the defendant, owned one eleventh in right of his wife, and on the 18th of March, 1839, represented to plaintiff that he owned the shares of the other eight heirs at law, which, together with his own interest, would make nine elevenths. On that day Carland and the plaintiff agreed in writing to make partition of the land, according to their respective interests, so as to allow the plaintiff to have his two elevenths in a body adjoining his, (plaintiff's) other land, and the defendant his nine elevenths laid off in the remainder of the land, and as an inducement to this partition, plaintiff agreed to let defendant have the rent of his part for one year, which he received. The parties employed a surveyor and had the land divided according to this agreement, and plaintiff was to have all the land ajoining him, up to a certain line run and marked by the surveyor. After this was done, the parties supposing that there was nothing more necessary to perfect their rights to their respective shares, thus laid off, directed a mutual friend, whe had been selected by them as a depository of their written agreement; to cancel the same, which was done by tearing off their names.

Both parties entered upon their allotted portions, and held for the space of nine years, during which time for six years there was no challenge or disturbance of each others rights; afterwards, however, about three years ago, the defendant filed a petition in the Court of Equity for the sale of the whole tract for partition, which is still pending, and is the other case named above. Before this was done each was entirely ignorant of any deficiency in their respective titles, or that any deed or other conveyance was necessary to complete them. The plaintiff alleges, that after finding out the necessity of doing so, before filing this bill, he offered to make a proper con-

veyance in fee of his interest in the nine elevenths which the defendant had got, and called on him to convey the nine elevents of the part assigned to plaintiff, which he refused to do.

The plaintiff says in his bill, that a sale of the property will be extremely prejudicial to him, as he has put expensive improvements on the part allotted to him, under the belief that his title was good. The rest of the heirs-at-law of Thomas Jones are made parties defendant.

The prayer of the first bill is for a specific performance of the contract of partition by decreeing that each party shall execute title according to the written agreement, and according to their occupation in pursuance thereof.

The answer of the defendant admits the contract and possession according to it, but says, in reply, that he is not able to make title to two elevenths; that one of these belongs to the heirs of Mrs. Lance, who died before he was able to procure title from her, although her husband had given bond to make him a title to her part; and another eleventh belongs to his wife.

The prayer of the bill in the second case is for a sale of the land for partition.

Baxter, for plaintiff.
N. W. Woodfin, for defendants.

Pearson, J. These two cases were heard at the same time, as they relate to the same tract of land. We are satisfied from the evidence, that Jones and Carland executed a written agreement to make partition of the land; Jones to have two parts out of eleven, and Carland nine parts; that a dividing line was accordingly run, and that the parties have held possession of their respective parts, in severalty, ever since.

At the time of the partition, the parties did not execute deeds, and Jones now calls on Carland for a specific performance of the agreement to make partition, and the execution of the necessary title-deeds. To this, Carland replies, that he is not able to perform his part of the contract; for that he owns

only seven parts, out of eleven, of the land; that his wife owns one part, and the other part belongs to the heirs-at-law of Mrs. Lance, who died before he was able to procure the title, although her husband had given bond to make title. The excuse offered by Carland for not performing his part of the contract, comes with a very ill grace, after the parties have acted upon the contract, and been in possession under it, for so many years, and made expensive improvements. In *Love* v. *Camp*, 6 Ire. Eq. Rep. 209, it was held by the Court, that if one entered into a contract to convey land, fraudulently representing himself to be the owner, and received the purchase-money, he could only relieve himself from a decree for a specific performance, by an averment and proof that he had made all reasonable exertions to procure the title, and was unable to do so.

Whether the principle of that case is applicable to the present one, we will not now decide; because it is suggested that, by a decree for a partition in the case of *Carland and wife* v. *Jones and others*, the commissioners may, in their discretion, and with due regard to the rights of all the parties concerned, allot to Jones, the two parts of which he is now in possession, or allot them to Carland, so as to enable him to comply with his contract, and put an end to the controversy with Jones. The report of the clerk and master, as to whether the interest of the parties requires a sale of the land for partition, is not at all satisfactory, and we feel at liberty, therefore, to act upon the suggestion, and to order a partition of the land, to be made by commissioners, so as to give Jones two parts, Carland, in his own right, seven parts, Carland and wife, one part, and the heirs of Lance the other part.

The case of Carland and Jones will be retained for further directions.

The commissioners will be directed to accompany their report, with a full statement of facts, so as to enable the Court to decide, whether any prejudice will be sustained by the heirs of Lance, by the order for actual partition.

Per Curiam. Decree accordingly.

HIRAM CARLAND AND WIFE AND OTHERS *against* JAS. W. JONES.

This cause was heard at last term with that of *Jones* v. *Carland*, (concerning the same matter); and this was retained for further directions.

Instead of a sale, the Court at last term decreed a partition by metes and bounds, with a suggestion that the part as contended for by Jones the plaintiff in the other suit might be assigned by the commissioners to him, which would put an end to the controversy as to the mode of division. Commissioners were appointed who did lay off the part contended for by Jones in the locality agreed on in their bond, yet, as the surveyor had made a mistake and allowed him several acres more than his proportionate share, the commissioners, by a line running parallel with the one formerly run, limited him to his proper number of acres; for this, Jones filed an interlocutory petition, stating that this curtailment of his lot, deprived him of valuable improvements, which he had made by cutting a ditch and making a fence on the part taken from him, and prayed the Court to have it made good to him by a decree against Carland. They also laid off to the children and heirs of Mrs. Lance their portion by a line parallel to that of the plaintiffs, and the remainder was allotted by them to Carland. There were exceptions to the report of the commissioners, but they need not be particularly noticed, as no point of law arises out of them.

The cause was heard on a motion for further directions, and upon exceptions to the report of the commissioners.

N. W. Woodfin, for plaintiffs.
Baxter, for defendant.

Pearson, J. We see no ground upon which the exceptions can be sustained; they are, therefore, overruled.

The petition of Jones in regard to his improvements, &c., has been considered by us; but we can see no ground upon which to base an equity in his favor. It was his folly or misfortune to cut the ditch, and make the fence, before he had received title to the land.

The report is in all things confirmed, and the commissioners are allowed $2,00 per day while doing the business, to be taxed by the clerk, &c.

PER CURIAM. Decree accordingly

JOSEPH McDOWELL CARSON, ADMR., *de bonis non, against* THOMAS S. DUFFY ADM'R.

Where a husband devised and bequeathed his property, real and personal, to his wife, with certain powers and trusts to be performed by her for the use of their children, and she, being executrix, assented to the legacy, an administrator *de bonis non* of the husband, has no claim to have the estate.

The children in the above case should have been made parties, and the administrator *de bonis non* of their father, could not represent their interest.

CAUSE removed from the Court of Equity of Rutherford County.

Otis P Mills, the late husband of the defendant's intestate, bequeathed to his wife, Rachel, personal property to sell, or use the same in any way she might choose, for her own use, and for the use, benefit and education, of their children; and upon the marriage or coming of age of any of the children, the whole remainder of the estate to be divided equally between her and the four children, the part of each to be ascertained and paid over as such child should marry or come of age. He also, by his will, gave her his real estate for her own use, and for the use and education of their children, with the power of selling any of the property for the previously declared uses and trusts; and with the power of purchasing a farm to be held upon the same trusts; and the said Rachel

was appointed sole executrix of the will. Mrs. Mills took the estate into her possession, and *used and enjoyed* the same from the death of her husband in 1844, till her death in 1856 (twelve years.) On her death the plaintiff was appointed administrator *de bonis non*, with the will annexed of Mr. Mills, and the defendant administrator of Mrs. Mills. The bill is filed by the plaintiff to recover of the defendant the property which Mrs. Mills had of her husband's estate, that the same may be held by him for the use and benefit of the children, according to the provisions of the will. Duffy, the administrator of Mrs. Mills, is the only party defendant.

The defendant answers that Mrs. Mills assented, and had the property for many years, as legatee; that she took up the debts of her husband and educated their children, and consequently became much indebted; and that such was her condition when she died; that much of this indebtedness has arisen from an effort to promote the interests of their children; and he insists that, for the purpose of paying her own debts out of her part, and for the purpose of indemnifying her for advances made to her husband's estate, it ought to be left in his hands, and that he is advised it is in law vested in him, as the wife's representative, so that the administrator *de bonis non*, of the husband, has no interest in the same.

The case was set down for hearing upon the bill, answer and exhibit, and sent to this Court by consent.

No counsel appeared for the plaintiff.
Gaither, for defendant.

Pearson, J. The pleadings are loosely drawn, owing, we presume, in some measure, to the fact that it is a friendly suit; the main object being to obtain the opinion of the Court in regard to the conflicting rights of the creditors of Mrs. Mills and of the children who claim under the will of their father. The creditors of Mrs. Mills are properly represented by the defendant, Duffy, who is her administrator; but in any view which can be taken of the case, the four children of the tes-

tator are necessary parties; they have a direct interest in the construction of the will, and the other questions presented, and should be parties, so as to enable them to take the benefit of, or be bound by our decree.

The bill does not charge expressly that Mrs. Mills assented to the legacy given to herself and the children; but, from the facts stated, an assent will necessarily be implied; consequently, the legal title was not vested in her, as the executrix of her husband, at the time of her death, but had passed to her and the children, subject to certain powers and trusts created by the will, for the benefit of herself and the children; so that, when the plaintiff was appointed "administrator with the will annexed, *de bonis non administratis*," there was nothing which had not been administered; and of course he did not acquire any title or interest of any sort in the slaves which are the subject of controversy.

In this view of the case the bill must be dismissed; because the plaintiff is a mere volunteer, having no concern in the questions which he sees proper to present to the Court.

But suppose Mrs. Mills had not assented to the legacy to herself and the children; then the legal title would be in the plaintiff, as administrator *de bonis non;* and if the defendant or any body else, interfered with his rights, and prevented his taking possession of the property, he has his remedy at law, and there is no *equitable ingredient* involved in the question. Nor has he, as administrator *de bonis non*, any sort of interest as to the manner in which things may be done between the creditors of Mrs. Mills and the children. According to his own showing, he has not the possession of the property, and cannot, therefore, maintain a bill of interpleader, or a bill in the nature of a bill of interpleader; and supposing he could do so, the children of the testator are the parties principally concerned, and should be parties to any proceeding in which an opinion of this Court is declared, affecting their rights.

PER CURIAM. Bill dismissed.

CATHARINE SENTILL AND OTHERS *against* DAVID ROBESON AND OTHERS.

Where two of the heirs-at-law take a conveyance for land, which a person was bound to convey to their deceased ancestor, who died intestate, such two heirs will be declared trustees for the other heirs.

A husband is not entitled to an estate by the curtesy in a mere *equitable right* in the wife, which does not amount to an estate.

Cause removed from the Court of Equity of Henderson County.

The facts of this case are sufficiently stated in the opinion of the Court.

N. W. Woodfin, for plaintiffs.
Baxter, for defendants.

Pearson, J. James Robeson died in 1797, leaving five children, all of tender years, who are his heirs-at-law, viz., John, David, Catharine, Sarah, and Leah. At the time of his death, he held a bond for the title of the land mentioned in the pleadings, and the purchase-money was all paid, except the sum of sixty dollars. The widow and children continued to live on the land. Robeson left a will disposing of his personal estate, but made no disposition of his land. Jesse Robeson, the executor, paid out of the personal estate the balance of the purchase-money, and took the title to himself in fee, with a stipulation expressed in the deed, that he would convey the land to David and John, *the two sons* of James Robeson, when they paid him the amount paid by him for the land.

When Catharine and Sarah married, they left the land, and have never been in possession since. The widow, David, John, and Leah, continued to live on the land. In 1839, Jesse Robeson executed a deed to David and John for the land, but there is no proof or allegation that they paid him the sixty dollars or any part thereof. Soon afterwards, David and John divided the land. David settled on his part. John,

Leah, and the widow, continued to live as one family on the part that John took in the division. About that time Richard Sentill, the husband of Sarah, and Catharine, who had married Guilford Sentill, and was then a widow, made a demand of David and John for their parts of the land, which was refused, on the ground that they had the exclusive title under the deed of Jesse Robeson. Since that time, David and John, and the defendant Merrill, who claims under John, have had possession; the widow and Leah being permitted still to live with John until he sold to Merrill and moved off. Merrill then turned the widow and Leah out of possession.

This bill was filed at Spring Term, 1852, by *Catharine*, whose husband died in 1837, and the children and grand-children of Sarah, who died in 1840, against David Robeson, John Robeson, and John Merrill, who claims under John, and against Leah, for conformity, who had removed to Georgia.

The bill seeks to set up the equity of the plaintiffs as the heirs of James Robeson. The plaintiff Catharine prays for a conveyance of one-fifth part, and the other plaintiffs for a conveyance of one other fifth part, as the heirs-at-law of Sarah Sentill.

The defendants David, and Merrill, claiming under John, rely upon the lapse of time as a bar to the plaintiffs' equity. They also insist that Richard Sentill, the husband of Sarah, is a necessary party, being entitled to her part as a tenant by the curtesy.

It is clear from the pleadings and proofs, that the plaintiffs once had an equity, and the only question is, whether they had lost it by the presumption of abandonment, or satisfaction under the statute, at the time the bill was filed.

With reference to this question, an enquiry was directed at last term as to the ages and dates of the marriages, &c., of the several plaintiffs in the year 1839. The plaintiff Catharine was, at that time, discovert; she and Richard Sentill then made a demand, which was refused, and David and John were allowed to hold adverse possession, up to the filing of the bill—some *thirteen* years; so, her equity is presumed to

have been satisfied or abandoned. As to her the bill must be dismissed.

Sarah died in 1840. Her husband, to whom she had been covert for many years, surviving her. So the presumption only applies to such of the plaintiffs, her children and grandchildren, as were of age, and not under disability, for ten years prior to the filing of the bill. According to the master's report, her daughter, Joicey, married under age, and died in 1847, leaving five infant children. They are entitled to a decree for their mother's part. James R. Sentill was of age at his mother's death, and is excluded. Samuel arrived at age 5th of February, 1841; so, there was a lapse of more than ten years before the bill was filed, and he is excluded. Guilford arrived at age 11th of October, 1842—the bill was filed *March Term*, 1852; so he is in time, and is entitled to a decree; the other children of Sarah, being all younger than Guilford, are, of course, in time, and are entitled to a decree.

The objection that Richard Sentill is a necessary party, being tenant by the curtesy of his wife's part, is not tenable. A husband is entitled to curtesy in a *trust*, or other equitable estate of his wife. This means an express trust—one by the consent of the parties, so as to give an *estate* in equity, as distinguished from a right in equity. This distinction is so fully discussed in *Thompson* v. *Thompson*, 1 Jones' Rep. 432; *Nelson* v. *Hughes*, 2 Jones' Eq. 33, that we will not again enter into it. In our case, Sarah, the wife of Richard Sentill, had no admitted trust—no *estate*, but only a right in equity to convert her brothers, David and John, into trustees for her. If the trust had been an express one, the statute would not have excluded any of her children. There is a further reason—the husband never had actual possession.

Per Curiam. Decree accordingly.

NOAH CLONINGER *against* JOHN SUMMIT AND ANOTHER.

Where A takes a conveyance of a tract of land, which B, the owner, had agreed by bond to convey to C, upon especial trust and confidence, that he will give C the same terms of payment that he had from B, and on such payment being made, that he will convey to C, and A gets possession of the title-bond which enables him to get the deed from B: it was *held*, that this agreement is not within the statute of frauds, and that C was entitled to relief.

THIS case is fully stated in the opinion of the Court.

Boyden, for plaintiff.
Avery and *Hoke*, for defendants.

PEARSON, J. The plaintiff has proved all the material allegations of his bill, notwithstanding the denial in the answer. According to the pleadings and the proofs, the facts are, that in 1848, the plaintiff contracted with one *Carpenter* for the purchase of a small tract of land at the price of $110, to be paid in five annual instalments of $22 each, for which he executed to Carpenter his notes, and took from Carpenter a bond for title, when the purchase-money was paid; thereupon, the plaintiff went into possession, and has lived on the land ever since. Before the last notes fell due, Carpenter, having determined to remove from the State, notified the plaintiff, who had made no payments towards the purchase-money, that he wished some arrangement made in regard to the land. The plaintiff had, at that time, made improvements on the land, in building, clearing, &c., of the value of $75, and one *Sigment* offered to take the land off his hands, pay Carpenter, and pay the plaintiff $75, in consideration of the improvements; but the plaintiff, having ascertained that the defendant, John Summit, was willing to befriend him by taking the title from Carpenter, and holding the land for him in the same way that Carpenter held it, and willing to save "his home," if he could, made an arrangement with the said John, by which he was to pay Carpenter the purchase-money, take up plaintiff's notes,

take the title from Carpenter, and hold it as a security for the purchase-money, and then in trust for plaintiff, when the purchase-money was paid. To enable him to procure the title from Carpenter, the plaintiff handed to him the bond of Carpenter for title. Carpenter agreed to take the notes of the defendant John, for the same amount, in place of the plaintiff's notes, which he handed over to him; and upon the defendant John surrendering to him his title bond, he executed to him a deed for the land. Plaintiff remained in possession of the land, and sometime afterwards, hearing that the defendant John was about to execute a deed to his son Langford, the other defendant, for the land, he tendered to the defendant John, the amount which he had paid Carpenter, together with interest, to wit, $125, and requested him to execute a deed to him for the land; but the defendant refused, saying he had conveyed the land to his son.

This mean subterfuge, showing that the original purpose of the defendant John, was not to befriend his neighbor, but to trick him out of "his home," will not avail the defendants; for the defendant Langford is a volunteer, having paid nothing for the land, and holds it subject to the plaintiff's equity.

But the defendants rely upon the statute of frauds. Does this case fall within its operation? The statute requires all *contracts* to *sell or convey* land, or any interest therein, to be in writing; so, the question is, do the facts declared, show a contract on the part of the defendant John, to *sell or convey* the land in controversy, to the plaintiff, within the meaning of the statute?

The plaintiff's equity does not rest upon the idea of the *specific performance of a contract.* The parties did not occupy the relation of vendor and vendee. The defendant did not agree to *sell* the land to the plaintiff; for at the time of this arrangement, he did not have the land, or any interest therein, to sell; nor was the plaintiff to *pay a price for it.* But the plaintiff's equity rests upon the idea of *enforcing the execution of a trust;* and the facts show that the relation of the parties was that of trustee and *cestui que trust.* By force of

the contract with Carpenter, the plaintiff, in the view of this Court, was the owner of the land. Carpenter held the legal title in trust to secure the payment of the purchase-money, and then in trust for the plaintiff. Had Carpenter sold the land to a third person, with notice, the purchaser would have been a trustee for the plaintiff. The substance of the arrangement between the parties was, that the defendant should be substituted in place of Carpenter, as a trustee for the plaintiff; and to carry this purpose into effect, the plaintiff puts the bond of Carpenter in the control of the defendant, without which special confidence he could not have acquired the title. It is evident the statute of frauds has no application.

This conclusion is supported by *Hargrave* v. *King*, 5 Ire. Eq. Rep. 430, where it is decided—"Where one, by parol, agrees to procure a lease for himself and others, and procures the lease in his own name, he is a trustee for those for whom he agreed to act, and the statute has no application."

Per Curiam. The plaintiff is entitled to a decree.

FINIS.

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OF

Vol. 2, Jones' Equity.

ABANDONMENT.

Where one is entitled to a contingent interest in two slaves, under a deed, and afterwards the same grantor makes another deed, conveying the same slaves and much other property in trust for the prior grantee and others, giving an indefeasible interest in the whole to each one, and such prior grantee acts as trustee, sells all the other property but the two slaves, distributes the proceeds, and takes his share of them, it was *Held* that he was to be considered as having abandoned his claims under the former deed, and, therefore, that the two slaves must be sold under the second deed, and distributed as the other property had been. *Brame* v. *Brame*, 280.

ABSCONDING DEBTOR.

Vide Privy in Judgment.

ADMINISTRATOR.

A Court of Equity in this State will not interfere to prevent the administrator of a deceased member of a firm from retaining, out of the individual assets of his intestate, satisfaction for a debt due him from the firm. *Hassell* v. *Griffin*, 117.

ADVANCEMENT.

1. Where an intestate had put slaves into the possession of his child and afterwards made a deed of gift to them, the advancement must take effect and be estimated as of the date of the deed, and not of the commencement of the possession. *Shiver* v. *Brock*, 137.
2. Property put into the possession of a child on his setting out in life, suitable to house-keeping and family purposes, is not to be considered as a present, but as an advancement. *Ibid.*
3. Property given to grand-childen is not liable to be brought into hotch-pot. *Ibid.*
4. Where a share in a residuary fund is given to persons that had been ad-

vanced by deeds of gift, which are ratified by the will, there is no reason why they should account for their advancements before they take such share. *Oden* v. *Wynne*, 440.

5. Grand-children taking in their own right, are not liable for advancements. *Skinner* v. *Wynne*, 41.

Vide STATUTE OF LIMITATIONS, 5.

AGREEMENT.

There is no remedy in Equity against the heirs-at-law of one who has violated his parol agreement, to devise to the complainant, the land descended. *Morgan* v. *Tillett*, 39.

ASSENT TO A LEGACY.

1. A legacy is given upon condition that a certain sum of money due the legatee is not collected by him after the testator's death; the money is, however, collected before the testator's death, the executrix, notwithstanding this, assents to the legacy and gives it over to the legatee; she cannot sustain a bill to have the property restored to her, upon the ground that when she assented to the legacy she was *ignorant* that she was herself entitled to a life-estate in that property—no fraud or unfair means to obtain her assent being alleged. *Foulkes* v. *Foulkes*, 260.

2. Where there are outstanding trusts to be performed by an executor, in respect of property bequeathed to one for life, and then over, it is the executor's duty to give a *special* and not a *general* assent, and he may require a bond from the life-tenant for the forthcoming of the property when the life estate falls in. *Lowe* v. *Carter*, 377.

Vide EXECUTOR, 2, 3.

ASSIGNMENT OF A CHOSE IN ACTION.

1. The transfer of an equitable chose in action, to be entitled to the protection of a Court of Equity must be founded on a valuable consideration. *Cannady* v. *Shepard*, 224.

2. The compromise of a controversy, wherein the legal owner of a chose in action supposed he was bound to the performance of an onerous and oppressive contract, when in truth he was not, is not such a sufficient consideration as will entitle the transferree to a decree for a specific performance. *Ibid.*

3. Where the contract sought to be enforced, is hard and oppressive, this Court will not interfere to enforce a specific performance, but will leave the parties to their remedies at law. *Ibid.*

4. In an assignment of interests resting in grant, if there be no fraud, the purchaser must depend, to make good a deficiency of value, wholly upon his covenants. *Cansler* v. *Eaton*, 499.

AUCTION SALE.

Vide CONCEALMENT OF TITLE.

BONDS.

Vide CONSTITUTIONALITY OF A LAW.

BREACH OF TRUST.

Where a trustee admits the allegation in a bill that he has committed a breach of trust in giving a release, and the releasee does not meet the allegation that he has contrived to obtain such release, but states immaterial matters as his answer, the Court will decree against them both. *Jones* v. *Poston*, 184.

CAVEAT EMPTOR.

1. Where one of the legatees of an estate, being also an executor, by the consent of those interested, buys property at the executor's sale, not for the purpose of a division, but simply for his own gain and emolument, he must abide by the rule of *caveat emptor*; and unless he avers and proves a warranty, or a fraud practiced upon him, must bear the loss arising from unsoundness. *Parker* v. *Leathers*, 248.
2. The maxim *caveat emptor* does not apply in cases where the parties are placed in a confidential position between themselves; for in such cases, there is an implied warranty of soundness, as well as of title. *Nixon* v. *Lindsay*, 230.

CHARTER.

Vide CONSTITUTIONALITY OF A LAW.

CHEROKEE LANDS.

Vide NEW TRIAL, 3.

CHILDREN.

Vide CONSTRUCTION OF A WILL.

CLERK AND MASTER.

Vide REFERENCE TO COMMISSIONERS, 2, 3, 4.

CODICIL.

1. The office of a codicil, ordinarily, is to vary by adding to or taking from a will, but not wholly to supplant it. *Bradley* v. *Gibbs*, 13.
2. In construing a codicil in reference to the will, the leading and controlling object is, as it is in construing the will itself, to ascertain the intention of the testator. *Ibid.*

Vide CONSTRUCTION OF A WILL, 5.

CONCEALMENT OF TITLE.

Where A, having an unregistered deed for half of a tract of land, stands by and sees the same sold at public auction by a trustee, as the land of another, and permits B to buy it, and afterwards to pay the purchase money and take a deed for it from the trustee, under an impression that he was getting a good title for the whole, which impression is well known to A,

and he does not disclose his title at such auction sale, nor say anything about it at that time, nor afterwards, before the money is paid; such concealment is a fraud upon B, and a Court of Equity will compel A to convey his moiety to B, upon the repayment of what he gave for such moiety. *Sanderson* v. *Ballance*, 322.

CONCURRENT REMEDIES.

Where vendees of property filed a bill in Equity against the vendors, alleging a fraudulent misrepresentation, and great losses arising from defects in the property, and praying a rescission of the contract, the Court will not compel the plaintiff to choose between releasing a recovery at law for the fraud obtained during the pendency of the bill, and dismissing the bill, (the sum recovered at law not having been accepted by the plaintiffs,) but will permit them to proceed with their suit in Equity, and in case of a recovery in that Court, to take the benefit of whichever recovery may appear the more adequate. *Pettijohn* v. *Williams*, 356.

CONFIRMATION OF A GIFT.

Where it appears to have been the intention of a testator to confirm a parol gift of a female slave previously made, the issue of such slave, born before such bequest, will pass, though no mention is made of such issue in the will. *Woods* v. *Woods*, 420.

Vide CONSTRUCTION OF A WILL, 19.

CONFUSION OF BOUNDARIES.

Where the assignee of the grantor of an easement tore away the dam at the head of a race, and filled up the race theretofore laid out and used, and ploughed over it, so as to efface the limits of it, against the remonstrances of the grantee, Equity will grant relief by issuing a commission to re-mark the site of the race, and order an account for loss of profits. *Merriman* v. *Russell*, 470.

CONSIDERATION.

An agreement between A and B, that the former, the father of a girl who had been debauched and got with child by B, would take the child and its mother and support them for three years, that he would further discourage his daughter from swearing the child, and would give up his action of damages, in consideration that B would convey him a tract of land, is not immoral or against the public policy. *Self* v. *Clark*, 309.

Vide ASSIGNMENT OF A CHOSE IN ACTION, 1, 2, 3.

CONSTITUTIONALITY OF A LAW.

1. An Act of the Legislature authorizing the commissioners of an incorporated town to subscribe to the stock of a company incorporated for the purpose of improving the navigation of a river contiguous to such town, is not forbidden by the constitution. *Taylor* v. *The Commissioners of Newberne*, 141.

2. It does not make a difference that the improvement contemplated by the Act is to begin several miles above the town, and to pass through several other counties than the one in which the town is situated. *Ibid.*

3. Nor does the Constitution forbid the Legislature to pass a law, authorizing such commissioners to make their bonds, to meet such stock subscription, and to levy a tax to pay the principal and interest thereof. *Ibid.*

CONSTRUCTION OF A DEED.

1. Where land descended from A to his daughter B, and from her to her uncle C, who took an estate in reversion after a life-estate in the mother of B, it was *Held* that a deed made by C conveying "all my interest in my brother A's property," did not pass this interest derived from his niece B. *Allen* v. *Allen*, 235.

2. In a suit for a partition by sale by one tenant in common against the co-tenants, where the petitioner is in possession of the land, and the interest sought to be sold, is a reversion, although the tenancy in common is denied by the defendants, inasmuch as an ejectment cannot be brought by the plaintiff to determine this right at law, a Court of Equity will proceed to determine the matter, especially where the question of tenancy depends merely upon construction. *Ibid.*

CONSTRUCTION OF A WILL.

1. Where a father in his will alludes to an expectancy that the children born to him of one marriage had of a legacy from their maternal grandfather, and provides that should these children get property from this source, it was to be divided in certain proportions between all his children, (including those of another marriage) and postpones the division of his own property for two years, and within that time property does come to these children by the death of their grandfather, *held* that this is a case coming within the principles that constitute the doctrine of election. *McQueen* v. *McQueen*, 16.

2. A bequest of slaves to C, (a married woman) and after her death, and the death of another, to fall to her heirs, there being nothing in the context to vary the meaning of the language from its legal purport, was *held* to be within the rule in Shelly's case, and to give the absolute property to the husband of C. *Kiser* v. *Kiser*, 28.

3. The word heirs, when applied in a will of personal property, means those who take by law or under the statute of distributions. *Ibid.*

4. A true and certain description of a slave by name in a will, cannot be obviated by a further and unnecessary description which is untrue. *Joiner* v. *Joiner*, 68.

5. Where a will contains a clear and unambiguous disposition of property, it shall not be allowed to be revoked by a doubtful expression in a codicil. *Ibid.*

6. A bequest of "all my property of every description" to "my good friend and relative" J. B. O., shows an intention to appoint "a universal lega-

tee," and therefore, not only tangible property, but monies, stocks, bonds and choses in action were held to pass by this bequest. *Hurdle* v. *Outlaw*, 75.

7. A testator devised as follows: "I give to my daughter E. a farm, &c., and after my wife's death I wish the land sold and the proceeds divided among my children and their heirs;" it was *Held*, that the effect of this clause was to make the land personal estate from the time it was ordered to be sold, and that the proceeds were distributable as personal estate. *Brothers* v. *Cartwright*, 113.
8. The word heirs, as applied to personal estate, means those who would take according to the statute of distributions. *Ibid.*
9. Where a testator having a brother and sister his next of kin, the brother having two daughters, and the sister three sons, devises in several preceding clauses, estates to the brother and to the sister, and to the children of each respectively, and gives to the brother and sister no other estate or interest in any part of the will, and concludes with a residuary clause as follows: "the rest and residue I wish to be equally divided between the children of my brother, J. S. C., and my sister N. A. A." *Held*, that the words "the children of" are to be understood in the last sentence of the clause; that both families of children take per capita; and that N. A. A. takes no interest under that clause. *Adams* v. *Adams* 215.
10. Where one bequeathed personal property to his wife for life, and then to his daughter for her life, and then to her (the daughter's) surviving children, it was *Held* that the wife's dissent from the will removed the interposed life estate, and that the daughter took the property immediately. *Adams* v. *Gillespie*, 244.
11. Where one-half of the value of a female slave and one-half of her increase were given to the wife, and the other half to a grandson, but the hire of all the slaves, including this, had, in a previous part of the will, been given to the wife for life, and then to her daughter for life, it was *Held* that the slave should be sold and that half the value of the slave should go to the widow, and the interest on the other half of the value be paid to the daughter during her life, and after her death, the principal be paid to the grandson. *Ibid.*
12. Where a horse, saddle and bridle were bequeathed to an infant under five years of age, there being no such chattels on hand, the executor was directed not to buy the articles; but it was *Held* that, in the distribution of the estate, the child's share should be augmented by the value of these articles thus pretermitted. *Ibid.*
13. A bequest of "all my slaves" to the testator's wife, during her life, and then "I give and bequeath said slaves (with the exception of those I acquired by intermarriage with her, those that I received in the division of my father's estate—old Joe and Ferryman Jim) to W. J. and E," with this clause in connection, "My will and desire is, that the hereinbefore excepted slaves be hired out, &c., to raise a fund for their transportation

to Liberia," accompanied with a strict injunction with the executor to *raise the means* for their transportation, was *Held* to mean that the intention of the testator was to liberate all the slaves that he got by his marriage, and their increase since his marriage, and all the slaves he received from his father's estate, and the increase of such since he received them, and old Joe and Ferryman Jim. *Cromartie* v. *Robison*, 218.

14. Where property is given by will to a mother for life, then to her children and on failure of children to others, with a provision that it shall be valued and the value deducted from a share left to her by the same will in the division of a general fund, it appearing to be the intention of the testator to make the families of his several children equal, the value of the fee simple in the land, and the entire estate in the personal property must be charged against the mother in the general division. *Mebane* v. *Womack*, 293.

15. A bequest to a deceased daughter and "to the heirs of her body," which is explained in the context to mean the children of such deceased daughter then living, will be construed to pass to such children all that the mother would have taken under such bequest if she had been alive at the testator's death. *Woods* v. *Woods*, 420.

16. Where a residuary fund is raised by various bequests in a will and a bequest is made of several slaves to one of the residuary legatees, with a direction that these slaves are to be valued, and "if the valuation shall be more than the due proportion of my estate," such legatee is to refund what is over to "my estate;" *it was Held*, that such bequest was not in satisfaction of the legatee's residuary share until the value of it had been added to the residuum, and that the deduction of the value of the legacy was then to be made. *Ibid.*

17. Where one was appointed administrator, and an entry of record made to that effect, and a bond given without security, his appointment is valid. *Jones* v. *Gordon*, 352.

18. A bequest of "all my other negro slaves to the American Colonization Society," (some being previously willed) passes as well those held in common with another, as those held in severalty. *Ibid.*

19. Where a testator, intending by his will to ratify and confirm parol gifts of slaves long before made to two of his sons, by a mistake describes the slaves that had been given to the one son as those given to the other and *vice versa*, the Court will declare the testator's intention to have been according to the dispositions by the parol gifts. *Lowe* v. *Carter*.

20. It is a general rule that where the name or description of a legatee is erroneous, and there is a reasonable doubt as to the person intended to be named or described, the mistake will not disappoint the bequest. The same rule applies to the subject of the bequest. *Ibid.*

21. Where, in construing a will, in order to carry out the intention of the testator, it becomes necessary to disregard the technical rules of grammar, the Court will do so. *Ibid.*

22. A bequest "that personal property belonging to my estate to be sold and

the proceeds divided," &c., does not embrace the bonds, notes and accounts of the testator. *Ibid.*

23. In fixing the construction of a will, the Court have a right to look to the state of the testator's family, and the condition of his property at the time when his will was written. *Woods* v. *Woods*, 420.

24. A devise of "the tract of land whereupon I now live and reside containing two hundred and twenty-five acres more or less," which was made up of original tract, and several others afterwards added, and which had been used by the testator as one plantation, will convey the whole tract thus added to, although the number of acres greatly exceeds that stated in the devise. *Ibid.*

25. Where a residuary fund is bequeathed to "all my legatees equally to be divided," it was *Held*, that persons to whom gifts of slaves were confirmed and one dollar in addition given, were entitled to come in for a share under the description of legatees. *Oden* v. *Windley*, 440.

26. Where a residuary fund is bequeathed "to all my legatees equally to be divided," it was *Held*, that one to whom a life-estate was given, remainder to his children must come in with his children for one share between them. *Ibid.*

27. Where, from the provisions of a will, it was manifest that the testator intended to establish entire equality between his children, such purpose is not varied by changes, subsequently made by the testator, in dispositions by deed of certain parts of the property; and those taking under the deeds subsequently made will be put to their election. *Flippin* v. *Banner*, 450.

28. Where all the personal property of a father had been placed by him in the hands of one of his sons to manage the same and dispose of a part of it in legacies, as he should afterwards direct in his will, (the overplus to belong to this agent, who was afterwards appointed executor,) and certain property is sold by the agent to another son, who had been put in possession of it with an intention of it being his; and such property is afterwards bequeathed to the son thus possessed of it, without any knowledge on the part of the testator that it had been sold; it was *Held*, that this legacy was not adeemed by the previous sale to the legatee, but that it should be made good to him out of the testator's estate. *Patton* v. *Patton*, 494.

Vide CODICIL; EXECUTORY DEVISE, 4.

CORPORATION.

Vide CONSTITUTIONALITY OF A LAW; REMOTE CONTINGENCY.

CONTRACT.

A promise to pay a debt out of a particular fund, which never came to hand, is not obligatory. *Bagley* v. *Sasser*, 350.

CONVEYANCE DECLARED A SECURITY.

1. In order to convert an absolute conveyance into mere security for money

loaned, it must be alleged and proven, 1st. That the agreement was that the property should be conveyed as a mere security. 2nd. That the defendant was induced to execute an absolute conveyance by fraud, imposition or undue influence. *Cook* v. *Gudger*, 172.

2. A mere gratuitous offer to allow the assignor of a title-bond for land to pay back the purchase money and interest, if done within twelve months, is not a sufficient ground to authorize the Court to convert an absolute conveyance into a security for the money paid. *Ibid.*

3. To convert a deed absolute upon its face, into a security for a debt in the nature of a mortgage so as to give a right to redeem, besides parol admissions that the deed was intended as a mere security, there must be facts, *dehors* the deed, inconsistent with the idea of an absolute conveyance and proof of fraud, oppression, ignorance or mistake, so as to account for the conveyance being absolute when such was not the intention. *Brothers* v. *Harrill*, 206.

4. Although there be some facts, *dehors* the deed, that tend to show a trust, yet if there be other facts perfectly consistent with the idea of an absolute sale, and the repugnancy between the trust sought to be established and the terms of the written instrument is still unexplained, a Court of Equity will not interfere with the legal rights of the parties by an injunction. *Ibid.*

5. To convert a purchaser who takes a deed absolute on its face into a trustee for another, and to convert the conveyance into a mere security for money loaned or advanced, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage, and the intention must be established by facts, *dehors* the deed of conveyance, which are inconsistent with an absolute conveyance. *Glisson* v. *Hill*, 256.

COVENANT FOR QUIET ENJOYMENT.

Vide REMEDY AT LAW.

CREDITOR.

Vide FRAUD, 3; FRAUDULENT CONVEYANCE, 1, 2.

CURTESY.

A husband is not entitled to an estate by the curtesy, in a mere *equitable right* in the wife, which does not amount to an estate. *Sentill* v. *Robeson*, 510.

DAMAGES.

Vide NE EXEAT.

DEED IN TRUST.

1. A deed in trust, after registration, is viewed in a different light in the Courts of this State, from what it is regarded in the English Courts, and is with us considered in the nature of a mortgage. *Stimpson* v. *Fries*, 156.

2. Where a deed of trust is made, leaving it discretionary with the trustee to pay such debts as he might *think best and find most convenient*, it was *Held*, that the trustor had a right to control the application of this fund by directing what debts should be paid; but that as to any debt the trustee had paid, or had assumed to pay, and as to his own debts, he had a right to retain funds to pay them before he was bound to obey such new directions. *Ibid.*

3. The debts which the trustee under these circumstances had promised by *parol* to pay, come within the principle above declared, and are not within the statute of frauds. *Ibid.*

DEMAND.

Vide Lost Note.

DESCENTS.

1. In the descent of real estate, under the act of 1808, the next collateral relations of the person last seized, who are of equal degree take *per stirpes* and not *per capita*. *Clement* v. *Cauble*, 82.

2. Pearson, J. *dissentiente*. Under the act of 1808, land descends *per capita* among the next collateral relations who are in equal degree. When those more remote bring themselves up to an equality by the right of representation, they take *per stirpes*. *Ibid.*

DESCRIPTION.

Vide Construction of a Will, 4, 20, 24, 25.

DEVISAVIT VEL NON.

Vide Dissent of a Widow.

DILIGENCE.

An executor is not an insurer of the assets of the estate; so that if he acts in good faith and with reasonable diligence, he is not responsible for their loss. *Deberry* v. *Ivey*, 370.

2. Where assets had been collected by an attorney in a distant State, and lost by his insolvency, the said attorney being, in public estimation, altogether trustworthy at the time of such employment, the executor was *Held* not liable for the loss. *Ibid.*

DISCOVERY.

A Court of Equity will not entertain a bill for a discovery which seeks to set aside a prior deed of trust on account of usury. *Masters* v. *Prentiss*, 62.

DISSENT OF A WIDOW.

During the pendency of an issue of *devisavit vel non*, and before the will is admitted to probate, the widow enters her dissent; it was *Held*, that her

dissent is effectual, and that her personal representative is entitled to a distributive share. *Oden* v. *Windley*, 440.

Vide CONSTRUCTION OF A WILL, 10.

DIVORCE.

1. Under the fifth section of the Act of Assembly concerning "Divorce and Alimony," (Rev. Stat. ch. 39, sec. 5,) a cause cannot properly be sent to the Supreme Court until the material facts charged shall have been found by the verdict of a jury. *Miles* v. *Miles*, 21.
2. The three years' residence required by the Act of Assembly, ch. 29, sec. 7, Rev. Stat., of the petitioner in a suit for a divorce previously to filing a petition or bill, must be an actual residence; and when the wife sues, the legal maxim that "her domicil is that of her husband," will not avail in the stead of an actual residence. *Schonwald* v. *Schonwald*, 367.
3. To entitle the wife to divorce *a mensa et thoro*, it is not necessary that the indignities complained of as rendering her condition intolerable and her life burdensome, should be a striking, or even touching of, the body, but foul and injurious accusations often repeated, with a withdrawal of all intercourse, refusing to bed with his wife, and a denial that she is his wife, with threats against her life, are sufficient indignities to entitle her to this relief. *Coble* v. *Coble*, 392.

DOWER.

1. The jurisdiction of Courts of Equity over the subject of dower is well established. It is often the most convenient, and sometimes the only jurisdiction that can afford the appropriate relief. Especially is this the case when the widow seeks to be endowed of an equity of redemption. *Campbell* v. *Murphy*, 357.
2. There is no statute of limitation in regard to the writ of dower; and if her case be not affected by the statute of presumptions, the widow is not bound to account for a delay. *Ibid.*
3. If there be no prayer against the administrator, he is not a necessary party to a bill for the assignment of dower. *Ibid.*
4. The right of a widow to dower is a legal right; it is prior to that of the heir, and his vendee is not protected by a want of notice and payment of a full price. *Ibid.*
5. A widow is not entitled to have dower of the improved value of her husband's estate, but she must take it according to the value as it was in his life time. *Ibid.*
6. A widow is entitled to a part of the insurance money arising upon the destruction of buildings in which she had an equitable claim to dower. *Ibid.*
7. She is also entitled to a third of the rent accruing thereon between the death of her husband and the decree of assignment. *Ibid.*

EASEMENT.

1. The words, "so much of my land lying, &c., as will conveniently carry

water to a saw mill, so as to be his profit and advantage," contained in a deed, convey no interest in the soil, but an easement or privilege to have sites for a race and mill dam, and to pond back the water, with the right of ingress and regress to repair, &c. *Merriman* v. *Russell*, 470.

2. And without words of inheritance, such a right is, by construction, given so long as the grantee and his heirs and assigns may wish to run the mill. *Ibid.*

ELECTION.

1. Where the persons put to an election by a bequest are infants, the Court will order a reference to the master to enquire concerning the relative values of the two interests, and will direct the election to be made of that which shall appear the more advantageous for them. *McQueen* v. *McQueen*, 16.
2. Where a legacy to an infant is charged with the payment of a sum of money, the Court of Equity will order a reference to the master, to ascertain whether it will be to the infant's advantage to accept of the legacy with the burthen, and will direct according to such ascertainment. *Ibid.*

Vide CONCURRENT REMEDIES; CONSTRUCTION OF A WILL, 1.

EMANCIPATION.

1. The next of kin have no interest in slaves bequeathed to one to be emancipated, and cannot properly bring suit in regard to them in their own names. Only the State or the slaves themselves, are interested in the question. *Hurdle* v. *Outlaw*, 75.
2. *Aliter*, where slaves are bequeathed in secret trust to be held nominally as slaves, but really as free persons. In such a case, the bequest would be void, and the next of kin might claim the slaves. *Ibid.*

Vide CONSTRUCTION OF A WILL, 13.

ENDORSEMENT.

Vide EQUAL EQUITIES, 2.

EQUITY OF REDEMPTION.

Vide DOWER.

EQUAL EQUITIES.

1. Where equities are equal in point of merit, and the junior equity in point of time gets the legal estate, a Court of Equity will not interfere in favor of the prior equity. *Carroll* v. *Johnston*, 120.
2. Where one, without notice of a prior equity for a valuable consideration, obtains a transfer of a note as a security for debts due him, he may protect himself, even after such notice, by taking an endorsement of the note, thus acquiring a legal title in aid of his equity, and the two rights thus united, will prevail in a Court of Equity. *Baggarly* v. *Gaither*, 80.
3. Where equities are equal the law prevails; but if the party having the

right at law acquires another interest inconsistent with his equity, so that he cannot honestly claim both, his equity is impaired, and the rule *qui prior est in tempore, potior est in jure*, prevails. *Ellis* v. *Durham*, 465.

EQUALITY.

Vide CONSTRUCTION OF A WILL, 14, 27.

EVIDENCE.

Vide FEME COVERT, 5.

ESTOPPEL.

Vide FORMER JUDGMENT, 1, 2.

EXECUTOR.

1. The Court will not allow a trustee to charge five per cent. for receiving and paying over dividends on bank stock. *Turnage* v. *Green*, 63.
2. Where executors have been led by statements of the will under which they act, to believe that the fund therein set apart for the payment of debts is sufficient for that purpose, and thus believing, have assented to the legacies, and let all the other property pass out of their hands, and it turns out that the fund provided for the debts, although prudently managed, is insufficient to discharge the same, such executors may call upon the legatees, in Equity, to make good to them advancements made to the creditors out of their own means. *Alexander* v. *Fox*, 106.
3. A resident of this State, by his will, bequeathed to A, the wife of B, certain slaves and other personal property, and appointed B and his wife executors. B and his wife were residents of another State, and though B caused the will to be proved, he did not give the bond required by the law of this State, to entitle a non-resident to letters testamentary, nor obtain such letters, but took possession of the property bequeathed to his wife, and after using it as his own for nearly twenty years, died, leaving his wife surviving; *Held*, that by this possession and use, the property did not vest in him, as husband, but belonged to his surviving wife. *Hairston* v. *Hairston*, 123.
4. Whether he was entitled to the profits received and used by him—*quære?* *Ibid.*
5. What is the effect of an assent to a legacy, by a non-resident executor, who dies without qualification—*quære?* *Ibid.*
6. It is a general doctrine of the common law recognized in this State, that no suit can be brought or maintained by any executor, or administrator, or against any executor or administrator, in his official capacity, in the Courts of any other country or State, except that from which he derives his authority to act, in virtue of the probate and letters testamentary, or the letters of administration there granted to him. *Brookshire* v. *Dubose*, 276.
7. This principle is not varied by the fact that a part of the assets of an estate have been recovered by an administrator appointed in another State,

suing in his individual capacity in a Court in this State upon promises made him by the defendant, and by such defendant seeking to enjoin the judgment. *Ibid.*

8. A legacy given to an executor does not deprive him of commissions, unless it is expressly mentioned as being in lieu of them. *Oden* v. *Windley*, 440.

9. It is no part of the duty of a trustee, appointed to sell for the payment of debts, to put slaves, conveyed in the trust deed, out as apprentices to trades, and he is liable to account for the value of the services of such slaves during such apprenticeship. *Sparkes* v. *Kearney*, 481.

10. An administrator or trustee appointed to sell, who keeps back certain slaves to await the event of a suit pending against him, (involving their title,) is not bound to account to the next of kin for their hires before the decision of the suit. *Ibid.*

11. Where a husband devised and bequeathed his property, real and personal, to his wife, with certain powers and trusts, to be performed by her for the use of their children, and she, being executrix, assented to the legacy, an administrator *de bonis non* of the husband, has no claim to have the estate. *Carson* v. *Duffy*, 507.

12. The children in the above case should have been made parties, and the administrator *de bonis non* of their father, could not represent their interest. *Ibid.*

Vide ASSENT TO A LEGACY, 2; DILIGENCE.

EXECUTORY DEVISE.

1. The expression "all my nephews and nieces" in a bequest, includes nephews and nieces of the half-blood as well as of the whole blood. *Shull* v. *Johnson*, 202.

2. "My nephews and neices that may be living at or after my decease" in a will, embraces as well those nephews and neices who are born after the testator's death, as those who were living at his death. *Ibid.*

3. Great nephews and nieces will not be included in such bequests. *Ibid.*

4. Where there is nothing in a will to show an intention that the legatees shall take by families they take *per capita*. *Ibid.*

FEME COVERT.

1. Where a contract in writing made in contemplation of marriage and signed by the intended husband and wife does not expressly exclude the intended husband, but gives them a joint use in the property with the intended wife during her life, she is not such "a free trader" as to make her bond obligatory on her in Equity, although the debt was contracted upon the faith of the property contained in the settlement. *Freeman* v. *Moses*, 22.

2. Where a trust estate is created by a will and a general plan laid down for the guidance of the trustee, wherein it is declared to be the purpose of the testatrix that the trust property should be secured and settled upon

three DAUGHTERS and their children respestively; "and the more effectually to carry into execution the will" it gives the property to the trustee "to hold in trust for the *sole* use and benefit of the daughters and their heirs forever." *Held*, that the trust being executory the plain intention of the testratrix should be carried out, by giving the separate use of the property to the wives for life, with a remainder to their children as well those born in the life time of the testratrix as those born afterwards. *Saunders* v. *Edwards*, 134.

4. A husband's estate after his death is not liable for the debts of his wife contracted by her *dum sola;* and although such estate may get the very property for which the debt was contracted, and (the wife being insolvent) a surety may have to pay the debt, yet such surety has no relief in Equity. *Cureton* v. *Moore*, 204.

5. The admissions of a husband are not competent to affect the sole and separate interest of his wife. *Bagley* v. *Sasser*, 350.

6. A parol promise by a husband to pay for land settled by third persons on his wife and children is void under the statute of frauds, &c. *Ibid.*

FORMER JUDGMENT.

1. A plea of a former judgment in order to amount to a bar, must be for the same subject matter, as well as between the same parties, *University* v. *Maultsby*, 241.

2. Therefore where a party brought a suit supposing he had the title, which suit was decided against him, it is no bar to another suit brought by him after acquiring a title. *Ibid.*

FRAUD.

1. Where the admitted facts of a case were of an extraordinary character, and showed that the plaintiff who was an intemperate man, with his faculties much impaired by that vice, was a victim of a gross imposition in the purchase of a stock of goods, the Court will afford relief, notwithstanding it does not fully appear from the proof that at the time of the trade he was absolutely drunk. *Freeman* v. *Dwiggins*, 162.

2. It is too late for a party to complain of a fraud in the quality of the thing sold and seek for a rescission of the contract after he has used it for two years—has tested its qualities—has assigned his interest in it, and the thing itself has so deteriorated in value that it cannot be restored in the same plight and condition as when it was received by him. *Pettijohn* v. *Williams* 356.

3. Where a person being insolvent placed money in the hands of one of his children, with a view to assist such child and benefit himself and thereby to defraud his creditors, a judgment creditor is entitled to follow his debtor's money and to have his debt satisfied out of a tract of land bought with it. *Brown* v. *Godsey*, 417.

Vide CONCEALMENT OF TITLE.

FRAUDULENT CONVEYANCE.

1. Where a person much in debt, paid for a tract of land and had a title-bond made to convey to his daughter, an infant, in order to defraud his creditors, a Court of Equity will entertain a bill to subject the debtor's interest to the satisfaction of a creditor who has got a judgment and an execution with a return of *nothing made*. *Gentry* v. *Harper*, 177.
2. Where a son receives from his father without consideration and in contemplation of the father's insolvency, and with the purpose of fraudulently withdrawing that much from the payment of the father's debts, a note on a third person due the father and transfers the same in part payment for a tract of land, the creditors have a right to hold the son liable to the amount of the note, and the land will be held as security for the payment thereof. *McGill* v. *Harman*, 179.

GIFT.

Vide ADVANCEMENT, 2; CONSTRUCTION OF DEED.

GRAMMATICAL CONSTRUCTION.

Vide CONSTRUCTION OF A WILL, 21.

GRAND-CHILDREN.

Vide ADVANCEMENT.

GRATUITOUS OFFER OF REDEMPTION.

Vide CONVEYANCE AS SECURITY.

GUARDIAN.

Vide IDIOT; LUNACY; PURCHASE BY TRUSTEE AT HIS OWN SALE.

HEIRS.

Vide AGREEMENT; CONSTRUCTION OF A WILL, 2, 8; PER CAPITA, &C., 3.

HUSBAND AND WIFE.

Vide CURTESY.

IDIOT.

1. The Court of Equity in this State cannot send the estate of an idiot out of its jurisdiction. But where there is an idiot residing in another State, and having a guardian in such other State, and funds in the hands of a guardian in this State, the Court can make an annual allowance for his maintenance, to be paid to the guardian abroad. *McNeely* v. *Jamison*, 186.

INFANT'S FUNDS.

Where there is a direction in a will for certain funds to be paid into the clerk's office of a County Court of another State for the benefit of certain infants, and there is no such County Court in that State, but there is

a Court of probate having charge of the estates of infants, the executor will be directed to pay into the office of the latter. *Lowe* v. *Carter*, 377.
Vide ELECTION.

INCREASE OF SLAVES.

1. As a general rule, children of a woman slave, born after the making of a will, do not pass under a bequest of the mother, but if it is manifest from the will itself, that such issue was intended to pass, it will be so declared by the Court, and such intention may be manifested by a codicil as well as from something appearing in the will itself. *Joiner* v. *Joiner*, 68.
2. The issue of a female slave, born after the making of a will, but before the death of the testator, does not pass simply by a bequest of the mother. *Lowe* v. *Carter*, 377.

Vide CONSTRUCTION OF A WILL.

INSURANCE MONEY.

Vide DOWER, 6.

INJUNCTION.

1. Upon a question of dissolving an injunction and sequestration to prevent the removal of property from the State, the bill of the plaintiffs will be considered as an affidavit sustaining the allegations on that side; and where, in such a case, the answer of the defendant was evasive as to the allegation of his insolvency, and silent as to the charge of an intention to remove the property, and puts his rights upon a question of law, which is doubtful, the Court will continue these orders till the hearing of the cause. *Wilson* v. *Mace*, 5.
2. Upon a motion to dissolve an injunction on bill and answer, if the answer admits the equity of the plaintiff's bill, but brings forward a new fact in avoidance, the injunction will be continued to the hearing. *Ibid.*
3. Where, to a bill for a special injunction, the defendant, who is an administrator, in his answer makes a formal denial of the matters alleged "according to the best of his knowledge and belief," and also alleges new matter in reply to the plaintiff's equity, the Court will not dissolve an injunction previously ordered. *Ashe* v. *Johnson*, 149.
4. Where one of two defendants has agreed to do a specific thing, for the benefit of the plaintiff, and the other defendant is the holder of a covenant under which it is to be done, also is the holder of the fund out of which compensation is to be made, and is about to part with the fund without making the compensation, the plaintiff has ground for going into a Court of Equity to restrain it from being put out of his hands. *Ibid.*
5. Stocks in a recently chartered Rail Road Company are to be viewed very differently from government stocks in England, which have a value in the markets of that country readily ascertainable. *Ibid.*
6. Where a bill for an injunction is answered by the administrator of one who is alleged to have been a party to an equitable contract, and such

administrator says that he is ignorant of the facts alleged in the bill, but that he has understood and believes them to be totally different from those alleged, and such statement is strengthened by some of the allegations in the bill itself, and appears probable and consistent, the injunction will be dissolved. *Clayton* v. *Lyle*, 188.

7. Where a memorandum of an agreement, made at the time when an absolute note was given, and the attendant circumstances show that such note was not to be absolute in reality, but was only to be collected on a contingency which has never happened, a Court of Equity will relieve against it. *Ibid.*

8. An injunction to stay the execution on a recovery at law in an action of detinue is as much an *ordinary injunction* as one to stay an execution on a judgment for money. In both instances they come within the rules governing ordinary injunctions, unless *irreparable injury* be alleged. *Brothers* v. *Harrill*, 209.

9. Where irreparable injury is alleged by the plaintiff, and is made apparent by the allegations in his bill, the Court will not dissolve a special injunction, simply on the denial in the defendant's answer. *Troy* v. *Norment*, 318.

10. In assignments of interests resting in grant, if there be no fraud, the purchaser must depend, to make good a deficiency of value, wholly upon his covenants. *Cansler* v. *Eaton*, 499.

Vide MILLS; REMEDY AT LAW, 2.

JUDGMENT—FORMER.

Where, under a will, a tenant in common of slaves, entitled to the share of another on a contingency, joins in a petition for partition, setting forth his title under the will, and a decree is made for partition generally, such decree is no estoppel to that person's claiming an interest in such slaves, which accrued afterwards by the happening of the contingency. *Haughton* v. *Benbury*, 337.

JUDGMENT AT LAW.

Vide CONCURRENT REMEDIES.

JURISDICTION.

1. Where it appears, from the bill itself, that the plaintiff had a complete defence at law to a note, which was not set up, Equity will not interfere to stop the collection of the debt. *Champion* v. *Miller*, 194.

2. It is no objection to the jurisdiction of the Court of Equity in matters of fraud that the thing fraudulently acquired was only worth $20. *Barnett* v. *Woods*, 199.

3. In a suit for partition by a sale, by one tenant in common against the co-tenants, where the petitioner is in possession of the land, and the interest sought to be sold is a reversion, although the tenancy in common is denied by the defendants, inasmuch as an ejectment cannot be brought

by the plaintiff to determine this right at Law, a Court of Equity will proceed to determine the matter; especially where the question of tenancy depends merely upon construction. *Allen* v. *Allen*, 235.

4. Where the case presented in a bill is one that merely involves a question of legal title, although it sets forth circumstances of hardship, a Court of Equity cannot interfere. *Cureton* v. *Moore*, 204.

Vide EXECUTOR, 4.

LAPSED LEGACY.

Where children are named in a will specifically they cannot take as a class, and therefore the legacy of one so named, who dies before the testator, lapses, and the rest of the children cannot take it. *Mebane* v. *Womack*, 293.

LEGACY—ADEMPTION OF.

Vide CONSTRUCTION OF A WILL, 28.

LOST NOTE.

Equity does not create law, but follows it. Where, therefore, a bank note, payable on demand at a particular place, has been lost or destroyed, no remedy will be afforded the owner in a Court of Equity before a demand has been made for payment at the place designated. *Streater* v. *Bank of Cape Fear*, 31.

LUNACY.

The guardian of an idiot or lunatic cannot, without the permission of the Court, exceed the annual income of the estate in expenditures for, and on account of, his ward. *Patton* v. *Thompson*, 411.

MILLS.

Where the erection of a public mill is demanded by the necessities and convenience of the public, and will materially conduce to the advantage of the owner of the mill-seat, the possible result of some small and uncertain injuries to two of the adjacent proprietors of land, by overflowing it, and slightly affecting the health of their families, was not deemed by the Court a sufficient ground to interfere by injunction to prevent the work, especially as those proprietors would have a remedy at law if their fears should be realized. *Wilder* v. *Strickland*, 386.

MISTAKE.

1. When there has been a palpable mistake by a draughtsman, in drawing a marriage settlement, the Court of Equity will reform it, so as to make it express the intention of the parties. *Clemmons* v. *Drew*, 314.

2. Where parties act upon a mutual mistake as to a fact, Equity will relieve for the purpose of carrying the intention into effect. Therefore:

3. Where tenants in common of slaves, appointed commissioners to make partition among them, which is done as they suppose fairly and equally,

but it turns out that a slave allotted to one of the shares was, at the time, laboring under a disorder of an incurable character, which rendered her worthless, though this was not known to any of the claimants, or to the commissioners, it was *Held* that the owners of the other shares were bound to contribute *pro rata* to the party receiving the defective lot. *Nixon* v. *Lindsay*, 230.

Vide ASSENT TO A LEGACY, 1; REFORMING A DEED, 1.

MORTGAGOR, &c.

It is settled upon authority, that the mortgaged premises cannot be sold by execution to satisfy the mortgage debt; and whether they can be thus sold at the instance of the mortgagee for any other debt not secured in the mortgage-deed, *quære?* *Thompson* v. *Parker*, 475.

MORTGAGE.

Vide DEED IN TRUST, 1.

MULTIFARIOUSNESS.

1. A bill, by several tenants in common of slaves, praying for a sale for partition, and also praying for an account for hires against one not alleged to be one of themselves, is multifarious, and cannot be sustained. *Drew* v. *Clemmons*, 312.
2. A bill, by tenants in common of slaves, for a partition, cannot be sustained while another is in the adverse possession of such slaves. *Ibid.*
3. A bill is not multifarious because it alleges several grounds in support of the same claim. *Barnett* v. *Woods*, 199.

NE EXEAT.

1. Where slaves are limited to a female, generally, and at her death, to another, on the contingency of her dying without issue, and the vendee of the husband of such female, with the fraudulent purpose of defeating the contingent estate, runs them out of the State, such remainder-man after the happening of the contingency is entitled to relief in Equity against such vendee. *Haughton* v. *Benbury*, 337.
2. The measure of relief of the remainder-man is the excess of the value of his contingent interest over that of the first taker, at the time of the fraudulent removal; his right to recover, in such a case, is not defeated or diminished by the death, or deterioration, of the slaves, after such vendee has fraudulently disposed of them. *Ibid.*

NEW TRIAL AT LAW.

1. If a verdict be obtained in a Court of Law by fraud, circumvention, or perjury, a Court of Equity may decree that the party shall consent to give his adversary a new trial in the same Court of Law. *Burgess* v. *Lovengood*, 457.
2. But allegations, that a certificate for a pre-emption right was obtained from the commissioners of Cherokee lands, by perjury, without specify-

ing the particular perjury, and from a mistake by the commissioners, both in respect of the law and facts, are not sufficient to authorize the interference of this Court with the action of the commissioners. *Ibid.*

3. Whether commissioners appointed under the Act of Assembly to settle claims of Cherokee lands, are not in the nature of arbitrators, and whether in any instance this Court could interfere to review their judgment, *quære? Ibid.*

NUISANCE.

Vide MILLS.

OVERFLOW OF WATER.

Vide MILLS.

PAROL GIFT.

Vide CONFIRMATION OF A GIFT.

PAROL PROMISE TO CONVEY.

A parol agreement that B should reconvey to A one-half of a tract of land which A was conveying to him by a deed absolute upon its face, (no fraud, imposition or mistake being alledged,) will not be upheld in a Court of Equity upon parol evidence alone of such agreement. *Campbell* v. *Campbell*, 364.

PARTNERSHIP.

Where one of the members of a firm withdraws from it and assigns all the effects to the other partner, under an agreement that such partner shall pay all the firm debts, and he conveys all the effects in payment of his own debts, *Held* that the firm creditors cannot follow these effects to subject them to the payment of the firm debts. *Rankin* v. *Jones*, 169.

PARTITION.

1. Where eight witnesses swore that an actual partition could not be made of land, without injury to all the parties, and six witnesses said they thought it could be divided if laid off in a particular way, without prejudice to the whole, the Court ordered a sale. *Windley* v. *Barrow*, 66.

2. A widow takes possession of a part of the land of her deceased husband, having had it assigned for her dower by some of the heirs, the others being out of the State and neither agreeing to or dissenting from this arrangement, and afterwards has most of it regularly laid off by Court, though a part, that was first occupied by her, is not finally assigned in her dower; it was *Held*, that she was not liable to account to the heirs for the profits received from any part of this land. *Roberts* v. *Roberts*, 128.

3. A brother who leaves the State cannot, when it suits him to file a bill for partition, require those of his brothers who have occupied parcels of the land to pay him a ratable part of the sum for which the parcels might

have been rented; the parcels occupied not being more than a ratable part of the whole tract. *Ibid.*

4. Tenants in common are entitled to partition as of right. *Holmes v. Holmes*, 334.
5. The mode of partition between tenants in common, whether by an actual partition at common law, or by sale, is a matter to be determined by a Court of Equity, under the Act of Assembly, Rev. Code, ch. 82. *Ibid.*
6. It is only upon a petition for a sale for the purpose of a partition, that the question is involved as to how the interest of the several parties will be affected by the one mode of partition or the other. *Ibid.*
7. Where B, one of eleven heirs at law, represents to A, another heir, who owned two-elevenths, that he had purchased eight parts, which, with his own, amounted to nine parts, and they agreed in writing to divide the land between them, so as to give A his two-elevenths adjoining his other land, and such agreement was carried into execution by marking a dividing line, each taking possession, which was held for nine years without question, upon a bill for specific performance, B shall not be heard to say that he was not able to perform, because he did not own all the shares he had claimed, but a performance will be decreed. *Jones* v. *Carland*, 502.

PARTIES.

Vide DOWER, 3; EXECUTOR, 10.

PER CAPITA AND PER STIRPES.

1. Where the two daughters of an intestate died in the life-time of their father, the one leaving two children, the other one, distribution must be made of his effects amongst these grand-children *per capita*. *Skinner* v. *Wynne*, 41.
2. Grand-children, taking in their own right, are not chargeable with advancements made to their deceased parents. *Ibid.*
3. Property directed to be sold, and "the proceeds of said sale to be equally divided between the bodily heirs of my three daughters," (naming them,) will be divided *per stirpes*. *Lowe* v. *Carter*, 377.
4. Where a general residuary fund is ordered to be "equally divided between my above named children," and in several previous items it is ascertained that the testator meant to confirm previous gifts to the children of his deceased children, the parents to whom such bequests are made, being then dead, and it is further provided in this bequest, that the children of a living daughter are to take her share, the fund must be divided *per stirpes* among his living children, and the descendants of his deceased children. *Woods* v. *Woods*, 420.

Vide CONSTRUCTION OF A WILL, 9; DESCENTS; EXECUTORY DEVISE.

PLEADING.

A prayer for an equity in the alternative, adverse to the main equity set up in the bill, cannot be allowed. *Rankin* v. *Jones*, 169.

POSSESSION ADVERSE.

Vide MULTIFARIOUSNESS, 2.

PRACTICE.

1. A petition to rehear a cause in this Court, is too late after a decree has been signed and passed. *Robinson* v. *Lewis*, 25.
2. PEARSON, J. Where two years have elapsed after the forfeiture of mortgaged personal property, the right of redemption is barred, although the mortgagor died before the forfeiture, and suit was brought within two years from the appointment of an administrator. *Ibid.*
3. The wife of one claiming a part of a fund raised by a sale of land under a decree of a Court of Equity, of which land, it is alleged, she is a tenant in common, is a necessary party. *Howerton* v. *Wimbish*, 328.
4. Where land has been sold under a decree of a Court of Equity, and on a petition by one of the parties, the fund has been ordered to be paid to him, it is not competent for one who was a party to the original petition, and who acted as a commissioner to make the sale, to file a bill *in the nature of a petition*, in the Court of Equity of another County, praying that a part of the fund may be paid to him, on the ground that he has no notice of the interlocutory petition. *Ibid.*

Vide DOWER, 3; INJUNCTION, 1.

PRE-EMPTION.

Pre-emption rights, secured to persons residing on Cherokee lands under the Act of 1851, which have been passed on by the agent of the State, and a certificate granted for the same, by such agent, may be transferred to a non-resident for a sufficient consideration, and such purchaser will be protected in this Court against a fraudulent invasion of his rights. *Barnet* v. *Woods*, 198.

PRESUMPTION FROM LENGTH OF TIME.

1. Where one sells, by deed, one-half of a share in an intestate's estate, and the assignee permits ten years to elapse after a legal ascertainment of the amount of such share and the reception of the whole of it by the assignor before a suit is brought for such half, the presumption of satisfaction or abandonment will bar the claim. *Wheeler* v. *Smith*, 408.
2. The borrowing of a sum of money by the assignee from the assignor within the ten years, and the repayment of a part of it, has no tendency to repel the presumption. *Ibid.*
3. The declaration of the assignor when shown the deed of assignment within the ten years, "that it was not as strong against him as he thought it was," was *Held* not to be sufficient to repel the presumption. *Ibid.*
4. Where a trustee is invested with an estate, or an unclosed trust, no length of time will bar its recovery. *Davis* v. *Colten*, 430.
5. Where a mere equitable right of action exists, it must be enforced within a reasonable time, or else, for the sake of repose, it will be considered as

having been abandoned, released, satisfied, or in some way arranged. *Ibid.*

6. The application of the statute creating a presumption of payment, &c., does not depend upon the party's knowledge of his rights. *Ibid.*

PRIORITY IN TIME.

Vide EQUAL EQUITIES.

PRIVY IN JUDGMENT.

A bill in the nature of an attachment, to subject a claim due to an absconding debtor from a third person, to the payment of a judgment against such debtor, will not be sustained where such debtor has only been made a party by advertisement and not by actual service on the person; because the decree asked for would not protect his debtor out of this State. *Love* v. *Bowen*, 49.

Vide SUBROGATION, 2.

PURCHASER WITH NOTICE.

Where a purchaser might see from his title deed that his vendor had given less than one-sixth of what he was giving for the same land, it was a circumstance to put him upon an inquiry, and coupled with the fact that there was another in possession than the person he was buying from, it was *Held* that the purchaser under such circumstances had a notice of the prior equity of the plaintiff, sufficient at any rate to induce a Court to continue an injunction against defendant's entry under a judgment and execution at law. *Webber* v. *Taylor*, 9.

PURCHASE BY A TRUSTEE AT HIS OWN SALE.

1. Where a trustee buys at his own sale, even though he may give a fair price, the *cestui que trust* has his election to treat the sale as a nullity, not because there *is*, but because there *may be*, fraud. *Patton* v. *Thompson*, 285.

2. A guardian who petitions for the sale of his ward's estate, gets an order of sale, acts as the agent of the clerk and master in making it, cries the sale, takes the bonds, and gives the information to the clerk and master, on which the report is made and the sale confirmed, will not be allowed to hold the land of his ward purchased by another for him at such a sale. *Ibid.*

REDEMPTION.

Vide CONVEYANCE DECLARED A SECURITY, 5.

REFERENCE TO A COMMISSIONER.

1. In a reference to a clerk and master in Equity, to ascertain the value or profits of property, the general rule is, that he should report his own judgment according to his belief of the testimony, and not a conclusion

arrived at by averaging the sums estimated by the witnesses. *Pilkington* v. *Cotten*, 238.

2. The mode of ascertaining value by averaging the sums proved by the witnesses, is an exception to the general rule, only to be resorted to from necessity. *Ibid.*

3. The opinion of a clerk and master that a slave is worth $1200, is strongly corroborated by the fact that he hired for $150 per year, and will be sustained against the opinions of many who estimated his value at lower sums. *Ibid.*

4. Where it appears that the master fixes a charge for hires and profits at a given sum, on the ground that interest is not to be allowed, it is no ground of exception that he does not afterwards allow interest on them. *Ibid.*

REFORMING A DEED.

1. Where a debtor makes a deed of a slave by the name of C to a creditor, in satisfaction of a previously existing debt, such creditor cannot, on the allegation that another slave J was meant, and that the wrong name was inserted, either by the fraudulent misrepresentation of the debtor, or by mistake, have the aid of a Court of Equity to set aside a subsequent deed of trust conveying the slave J to secure *bona fide* debts, without notice of the fraud or mistake, in order that the first deed may be reformed so as to take the slave J. *Smith* v. *Turrentine*, 253.

2. Equity never interferes to aid one creditor against another, on the ground of mistake. *Ibid.*

REMAINDER—LIMITATION IN.

Where there is a limitation over of personal property, by will, after the death of a legatee for life, and such legatee dies before the testator, *Held*, that the ulterior bequest must take effect, although the estate of the first legatee never vested. *Mebane* v. *Womack*, 293.

REMAINDER—VALUE OF.

Vide NE EXEAT.

REMEDY AT LAW.

1. Where the buyer of a tract of land has a full and complete remedy on a covenant of quiet enjoyment contained in the deed he has received, he cannot sustain a bill in a Court of Equity to enjoin the collection of the purchase money, for a deficiency in the title. *Wilkins* v. *Hogue*, 479.

2. Where it appears, from the bill itself, that the plaintiff had a complete defence at law to a note which was not set up, Equity will not interfere to stop the collection of the debt. *Champion* v. *Miller*, 194.

Vide SALE OF EQUITIES, 3.

REMOTE CONTINGENCY.

A bequest made in 1818, to Mary Porter, of slave property, and "in case

the said Mary Porter should die without issue, then in that case, it is my will that the above named negro, &c., be divided among my six sons, and to the survivor, &c.," gives the absolute estate to the first taker, the limitation over being too remote. *Porter* v. *Ross*, 196.

RENT.

Vide DOWER, 7.

RESIDUARY FUND.

Vide CONSTRUCTION OF A WILL, 25, 26.

RETAINER.

Vide ADMINISTRATOR.

SALE OF AN EQUITY UNDER AN EXECUTION.

1. The act of 1812, subjecting trust estates to sale under an execution, does not embrace mere equitable "rights," but is confined to equitable "estates;" it was, therefore, *Held*, 1st, that the *right* to have it declared in a Court of Equity, that one has made an election to give up his own property, or is bound to do so or to forfeit a legacy, and to ask for a decree converting him into a trustee, is not the subject of a sale under an execution. *Nelson* v. *Hughes*, 33.
2. 2d. That a right to ask for a decree converting A into a trustee for B, on the ground that the purchase was made with B's money, and for his use, is not the subject of a sale under an execution. *Ibid.*
3. 3rd. A trust liable to be sold by execution under the Act of 1812, by the sale, is converted into the legal estate, and the right to it must be asserted in a Court of Law, and not in Equity. *Ibid.*
4. The Act of 1812, Rev. Stat. ch. 45, sec. 5, is to be construed strictly, and its general words must be restrained so as not to extend its operation to cases which do not come within its meaning, or the mischief intended to be remedied. *Thompson* v. *Parker*, 475.
5. An equity of redemption, therefore, cannot, under that Act, be sold by execution, unless it be absolute, undisputed, and grow out of a perfect mortgage. *Ibid.*
6. Where there is a provision in a mortgage-deed, that the mortgagee may have the land discharged of the right of redemption at his election on paying a further stipulated sum, the right of redemption is not the subject of an execution sale. *Ibid.*
7. Where the subject of the mortgage is itself an equity, the equity of redemption cannot be sold under that Act. *Ibid.*

SATISFACTION OF A LEGACY.

The reception of an article of the same kind as that bequeathed, before the will was written, is not a satisfaction of a general bequest of an article of personal property. *Woods* v. *Woods*, 420.

Vide CONSTRUCTION OF A WILL, 16.

SHELLY'S CASE.

Vide CONSTRUCTION OF A WILL, 2.

SHERIFF.

Vide SUBROGATION, 2, 3 ; PRIVY IN JUDGMENT.

SPECIFIC PERFORMANCE.

1. A specific performance will not be decreed in a Court of Equity, as a matter of course ; where, therefore, a contract appears to be unfair, greatly unequal, and oppressive on the side of defendant, the Court will withhold its aid, and leave the plaintiff to such remedy as he may have in a Court of Law. *Lloyd* v. *Wheatly*, 267.
2. The compromise of a controversy, wherein the legal owner of a chose in action supposed he was bound to the performance of an onerous and oppressive contract, when in truth he was not, is not such a sufficient consideration as will entitle the transferree to a decree for a specific performance. *Ibid.*
3. Where the contract sought to be enforced is hard and oppressive, this Court will not interfere to enforce a specific performance, but will leave the parties to their remedies at law. *Cannady* v. *Shepard*, 224.

Vide PARTITION, 7.

STATES—THE SEVERAL.

Vide IDIOT ; NE EXEAT.

STATUTE OF LIMITATIONS.

1. The personal representative of a trustee, constituted by a deed in trust has no right to plead the act of limitation passed in 1789, (the two years act,) nor the statute of 1826, (creating a presumption of satisfaction, &c., within *ten years*,) against his *cestui que trust* calling for a settlement of the trust. *Johnston* v. *Overman*, 182.
2. Where a parol gift of a slave is made by a father to his son, and the son, with the knowledge and approbation of his father, bequeaths such slave, and the legatee holds it, under such bequest, for three years and more after the son's death, he will be protected under the statute of limitations. *Wood* v. *Woods*, 420.
3. The statute of limitations, Rev. Stat., ch. 65, sec. 19, applies to a right of redemption arising from construction of a Court of Equity, and the time must be computed from the accrual of the right to sue. *Kea* v. *Council*, 345.
4. The owner of slaves had mortgaged them, and the time for redemption was several times postponed by memoranda on the mortgage deed, and finally the right to redeem rested on the parol promise of the mortgagee to let the mortgagor redeem at any time, but after three years the property was sold by a constable, who had executions against the mortgagor, by consent of the parties, on the terms of first satisfying the mortgage debt,

and bought by the mortgagee, who held possession for fourteen years under that purchase, denying the right to redeem; *Held*, that the statute was a bar, and that an agreement to refer the question of redemption to arbitration, which was violated by the mortgagor, did not revive it. *Ibid.*

5. Where slaves, advanced by A to his son B, were, on the death of this son, divided between his widow and children, and held adversely thereafter for three years, A, the father, is barred by the statute of limitations from afterwards reclaiming them. *Jones* v. *Gordon*, 352.

Vide DOWER, 2.

STOCKS.

Vide INJUNCTION, 5: TAX ON DIVIDENDS.

SUBROGATION.

1. A as principal and B as his surety, executed a bond to C, with a condition to make a title to land on the payment of the purchase money; before the purchase money was all paid, the land was sold at sheriff's sale to satisfy executions against A who became insolvent; C sued B for the remainder of the purchase money, and recovered it; *Held*, that B had a right to follow the land and have remuneration out of it in the hands of the purchaser at sheriff's sale for the money he had thus paid. *Freeman* v. *Mebane*, 44.

2. A deputy sheriff collected money and failed to pay it over, which was recovered out of the sheriff's sureties on his official bond, the sheriff himself being insolvent, *it was Held*, that the sureties of the deputy sheriff, on a bond to indemnify his principal against his delinquency in office, are liable in Equity to the sureties of the sheriff, for the amount thus paid by them. *Brinson* v. *Thomas*, 414.

4. *It was Held further*, that all the sureties to the sheriff's bond, as well as those who had not paid the money as those who had, were properly made parties to this suit. *Ibid.*

TAX ON COLLATERALS.

One domiciled in Canada dies intestate and without issue, leaving property in this State, the brother of the intestate receives the property from the administrator appointed here; *Held*, that such distributee is liable to the tax imposed by our statute. *Alvany* v. *Powell*, 51.

2. Property bequeathed to Davidson College, or to a Church, is liable to this tax before it is delivered to the legatees, although exempted by law afterwards. *Barringer* v. *Cowan*, 436.

TAX ON DIVIDENDS.

The Act of 1854, (Rev. Code, ch. 99. sec. 20,) imposing a tax on the dividends of individual holders of bank-stock, is not unconstitutional. *State* v. *Petway*, 396.

TITLE TO LAND.

Where one was bound in a bond to make title to land, and it appeared that the land had been granted by the State more than fifty years ago, and that it had been cultivated during that time by persons coming in under the original grantees, and that for the last twenty-three years they had mesne conveyances reaching down to the vendor, *Held* that this title is good. *Rhodes* v. *Chandler*, 1.

2. Where a vendee, receiving a defective title from his vendor, afterwards completes it, all that he can claim from his vendor in a Court of Equity is the amount expended in completing his title. *Ramsour* v. *Shuler*, 487.

TITLE TO A CHATTEL.

Vide CAVEAT EMPTOR.

TRUST SATISFIED.

Where the right of a *cestui que trust* to a trust estate is immediate and absolute, there being no ulterior limitation, and no continuing duty to be performed with it by the trustee, the Court will decree the legal estate to be conveyed to those entitled. *Turnage* v. *Greene*, 63.

TRUSTEE—DECLARED BY COURT.

1. Where two of the heirs-at-law take a conveyance for land, which a person was bound to convey to their deceased ancestor, who died intestate, such two heirs will be declared trustees for the other heirs. *Sentill* v. *Robeson*, 510.

2. Where A takes a conveyance of a tract of land, which B, the owner, had agreed by bond to convey to C, upon especial trust and confidence, that he will give C the same terms of payment that he had from B, and on such payment being made, that he will convey to C, and A gets possession of the bond, which enables him to get the deed from B; it was *Held*, that this agreement is not within the statute of frauds, and that C was entitled to relief. *Cloninger* v. *Summit*, 513.

Vide BREACH OF TRUST.

TRUSTEE—NEGLIGENCE IN.

Where a trustee is appointed for the purpose of protecting the trust property from the debts and extravagant expenditure of the *cestui que trust*, who is to have the use of it for his life, with a limitation over, and such trustee encourages extravagance and waste in the *cestui que trust* by lending him money, becoming his surety, and otherwise becoming his creditor, the Court will not give him its aid to subject the trust property to the payment of such debts; especially where the trustee has already authority to sell for reasonable and proper expenditures. *McKnight* v. *Wilson*, 491.

2. It is no part of the duty of a trustee, appointed to sell for the payment of debts, to put slaves, conveyed in the trust deed, out as apprentices to trades, and he is liable to account for the value of the services of such slaves during such apprenticeship. *Sparkes* v. *Kearney*, 481.

UNIVERSAL LEGATEE.
Vide CONSTRUCTION OF A WILL, 6.

VALUATION.
Vide REFERENCE TO COMMISSIONER, 1, 2, 3, 4.

VENDEE.
Vide DOWER, 4.

VESTED INTEREST.
1. A bequest of slaves and other personal property, to the testator's wife and two children, "to remain in joint stock until my children shall have attained the age of twenty-one, then their portion to be set apart to them," conveys a vested interest to the children, the possession of which, however, is to be postponed till their arrival at the age of twenty-one. *Hathaway* v. *Leary*, 264.
2. Such an estate is not defeated by the death of one of the children before 21, but is recoverable by his personal representative. *Ibid.*
Vide EXECUTOR, 9.

WARRANTY OF SOUNDNESS.
Vide CAVEAT EMPTOR.

WASTE.
1. A widow has a right to clear the lands assigned to her for dower, for the purposes of cultivation, where it is necessary for the enjoyment of the estate; provided it is done with a due regard to the proportion of wood and cleared land. *Lambeth* v. *Warner*, 165.
2. The clearing of sixteen acres in addition to thirty acres already cleared in a tract of 240 acres heavily timbered, is not out of proportion or unreasonable as regards the rights of the remainder-man. *Ibid.*

WIDOW.
Vide PARTITION, 2; WASTE, 1.

WILL.
Vide CODICIL.

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